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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-871

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman, defendants in the District Court, appellees below, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above case on September 27, 1976.

I.

OPINIONS BELOW

The opinions of the District Court appear as Appendices A and B hereto, *infra*, pp. A1-A12, and are not published.

The opinion of the Court of Appeals appears as Appendix C hereto, *infra*, pp. A13-A25, and is reported at 1976-2 Trade Cases ¶61,086, — F.2d —.

II.

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1976 (Appendix C, *infra*, p. A13). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

III.

QUESTION PRESENTED

Even though *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), established that, where competitive products are readily available, vertical confinement of a manufacturer's sales of merchandise to selected dealers would not violate the Sherman Act, does a complaint nevertheless state a claim under §1 of the Sherman Act merely by alleging that a vertical exclusive franchise agreement between an automobile manufacturer and a dealer is an unreasonable restraint of trade?

IV.

STATUTES INVOLVED

The statute directly involved in the petition is 15 U.S.C. §1 which is set forth in Appendix D hereto, *infra*, p. A25.

V.

STATEMENT

A. The Nature of the Case and Its Disposition Below.

Respondent Quality Mercury Inc. (hereinafter referred to as "Quality"), a franchised Mercury dealer,[1] commenced this action on or about October 1, 1974, against two sets of defendants: (1) Respondents Ford Motor Company and Ford Marketing Corporation (hereinafter collectively referred to as "Ford"), the manufacturer and distributor of several brands of passenger cars, including the Lincoln line of automobiles[2]; and (2) Petitioners Prestige Lincoln-Mercury, Inc., franchised as both a Lincoln and Mercury dealer,[3] and N. Grossman and H. I. Grossman, its principals (hereinafter collectively referred to as "Prestige"). Quality asserted in its complaint that Prestige and Ford had combined and conspired to restrain trade and commerce in violation of Section 1 of the Sherman Act (15 U.S.C. §1) by maintaining Prestige as the sole Lincoln dealership in the Minneapolis area and by denying Qualty a franchise to sell Lincolns.[4]

Prestige moved the trial court for judgment on the pleadings pursuant to Rule 12(c), Federal Rules of Civil

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[1]Complaint, Paragraphs 2 and 17(b), Appendix E, *infra*, pp. A28 and A32.
[2]Complaint, Paragraphs 9 and 10, Appendix E, *infra*, p. A29.
[3]Complaint, Paragraph 13, Appendix E, *infra*, pp. A30-A31.
[4]Complaint, Paragraphs 15 and 16, Appendix E, *infra*, pp. A31-A32.

Procedure, on the ground that Quality's complaint failed to state a claim upon which relief could be granted. The District Court, by memorandum decision, granted Prestige's motion.[5] Subsequently, Ford also moved the Court for judgment on the pleadings and its motion was likewise granted.[6] Quality appealed the granting of judgment on the pleadings in favor of both sets of defendants to the United States Court of Appeals for the Eighth Circuit. On September 27, 1976, that Court reversed the decision of the District Court and remanded the case for further proceedings.[7]

B. The Relevant Facts

The District Court, after considering the complaint in the light most favorable to Quality, concluded that it did not state a claim upon which relief could be granted because, *inter alia,* the complaint failed to allege facts showing an agreement, combination or conspiracy violative of the antitrust laws. The entirety of Quality's factual allegations relating to the claimed violation of the antitrust laws is contained in Paragraphs 15, 16 and 17 of the complaint. In Paragraphs 15 and 16, Quality asserts that Ford and Prestige have violated the antitrust laws by maintaining Prestige as the sole Lincoln distributorship in the Minneapolis market with no other purpose than to insulate Prestige from intrabrand competition. (Appendix E, *infra,* pp. A31-A32. Quality alleges in Paragraph 17 that Ford and Prestige committed the following acts in furtherance of the alleged conspiracy: (1) granting Prestige the sole Lincoln dealership notwithstanding determinations by

[5]Appendix A, *infra,* p. A1.
[6]Appendix B, *infra,* p. A11.
[7]Appendix C, *infra,* p. A13.

both Ford and Prestige that there is a need for another Lincoln dealership in the Minneapolis area; (2) refusing to grant Quality a Lincoln dealership notwithstanding the policy of Ford's Lincoln-Mercury Division that its supervised dealers should sell both lines of automobiles; and (3) representing to Quality that a letter from an agent of Ford to Prestige dated April 11, 1962, is a binding contract which prevents Ford from franchising an additional Lincoln dealership in the Minneapolis area despite Ford's policy of franchising additional Lincoln dealers at sites which are more than ten miles from an existing Lincoln dealer. (Appendx E, infra, pp. A32-A33).

Nowhere in the complaint does Quality allege that any illegal ramifications, such as price fixing, have resulted from the exclusive franchise granted to Prestige, or that Mercury dealers are prohibited from selling other lines of automobiles,[8] or that there are not competitive products readily available in the market,[9] or that there was an overall scheme whereby Lincoln dealers control the Board of Directors of Ford or set criteria for marketing areas or vote on who may be accepted as new dealers, or that Prestige has combined or conspired with any other Lincoln dealer to allocate horizontally territories in which Lincolns could be sold or to exclude Quality from the Lincoln market. What Quality has pled is purely and simply a vertical exclusive franchise agreement between Ford and Prestige and nothing more.

[8]To the contrary, Quality alleges that, in addition to the Mercury line of automobiles, it also sells "a foreign-made automobile." (Complaint, Paragraph 12, Appendix E, *infra,* p. A30.
[9]To the contrary, Quality alleges that the Lincoln line of automobiles is competitive "with Cadillac and Chrysler Imperial." (Complaint, Paragraph 10, Appendix E, *infra,* p. A29.

The District Court, in concluding that Quality had failed to allege a violation of the antitrust laws, commented (Appendix A, *infra*, pp. A8-A9):

> "This Court concludes that the plaintiff has pled only an exclusive franchise agreement between Prestige and Ford of the variety found to be legal in *Schwing* [*Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), *aff'd* 239 F. 2d 176 (4th Cir. 1956), *cert. denied* 355 U.S. 823 (1957),] and *Packard* [*Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D.C. Cir. 1957), *cert. denied* 355 U.S. 822 (1957)]. The Court also finds a close resemblance to the situation pled in plaintiff's complaint and those found to be legal in *Top-All Variety, Inc. v. Hallmark Cards, Inc.*, 301 F. Supp. 703 (S.D. N.Y. 1969) (exclusive franchise in the greeting card industry), and *Ace Beer Industries* [*sic*] *v. Kohn, Inc.*, 318 F. 2d 283 (6th Cir. 1963) (exclusive franchise in beer distribution)."

The Court of Appeals, admitting the unprecedented nature of its decision[10] and relying upon Judge Bazelon's dissent in the *Packard* case[11] and two law review articles,[12] reversed the District Court and ordered the case remanded for trial to give Quality an "opportunity to prove the unreasonableness of the restraint." (Appendix C, *infra*, p. A23).

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[10]Appendix C, *infra*, p. A22, n. 6.
[11]*Id.* at p. A20.
[12]*Id.* at p. A22, n. 6.

VI.

REASONS FOR GRANTING WRIT

Permitting an Unsuccessful Applicant for an Additional Franchise in an Area to Litigate the Reasonableness of the Restraint Resulting From an Existing Vertical Exclusive Dealing Agreement Would Inundate the Federal Courts With a Flood of Cases Which Would Have the Ultimate Effect of Impairing Rather than Promoitng Competition.

A. The Court of Appeals Decision Involves an Important Question of Federal Law Which Should be Settled by This Court.

Franchising has become an important factor in preserving in the American marketplace the presence of the small independent merchant. As Mr. Justice Stewart noted in his separate opinion in *United States v. Arnold, Schwinn & Co., supra*, 388 U.S. at 386-87:

> "* * * [F]ranchising promises to provide the independent merchant with the means to become an efficient and effective competitor of large integrated firms. Through various forms of franchising, the manufacturer is assured qualified and effective outlets for his products, and the franchise enjoys backing in the form of know-how and financial assistance. These franchise arrangements also make significant social and economic contributions of importance to the whole society * * *.
>
> "Indiscriminate invalidation of franchising arrangements would eliminate their creative contributions to competition and force 'suppliers to abandon franchising and integrate forward to the detriment of small business. In other words, we may inadvertently

> compel concentration' by misguided zealousness. As a result, '[t]here [would be] less and less place for the independent.' *Standard Oil Co. v. United States,* 337 U.S. 293, 315, 69 S. Ct. 1051, 1062, 93 L.Ed. 1371, 1386 (separate opinion of Mr. Justice Douglas). 'The small, independent businessman [would] be supplanted by clerks.' *Id.*, at 321, 69 S. Ct. at 1067." (Footnotes omitted).

The pervasiveness of franchising in our economy is evident from the fact that in 1972 there were 445,281 franchised businesses in the United States,[13] 25,530 of which were franchised automobile dealerships.[14]

The rule adopted by the Court of Appeals has grievous implications for the common and established practices of franchising and the granting of exclusive dealerships. Under the Court of Appeals approach, by the simple device of alleging that an exclusive franchise is unreasonable in duration and/or territory, every unsuccessful applicant for a nearby franchise can bring suit against the franchisor and the existing franchisee and subject them to the substantial expense and burden of pretrial discovery and a trial on the merits. The Court of Appeals would substitute the judgment of a federal court and jury for the business judgment of the franchisor on the question of how many outlets he will have for his products and how much "elbow room" each distributor will be granted for how long a period of time. Every successful exclusive dealership would provide a tempting target for a treble damage action challenging the agreement for exclusivity, since the

[13]*GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 998 n. 29 (9th Cir. 1976), *cert. granted* 45 Law Week 3299 (October 18, 1976).

[14]Schmitt, "Antitrust and Distribution Problems in Tight Oligopolies—A Case Study of the Automobile Industry," 24 Hastings L.J. 849, 882 n. 161 (1973).

success of the dealership could be argued to demonstrate the "need" for another dealer and the unreasonableness of the exclusive. Accordingly, the rule adopted by the Court of Appeals would markedly reduce the incentive for a businessman to accept a franchise and invest the money and effort necessary to develop the local market for the franchisor's products. Competition and potential competition between manufacturers would be stifled as a result.

Because of the great impact this ruling will have on a basic method of doing business in the United States, it is of utmost importance that this Court, at the pleading stage and before the floodgates are opened to a sea of litigation, consider and construe the Sherman Act to determine whether a claim is stated under Section 1 simply by the allegation that an existing vertical exclusive dealing arrangement is an unreasonable restraint.[15]

B. The Court of Appeals Decision Conflicts With Prior Decisions by This Court and Other Courts of Appeals.

In arriving at its decision, the Court of Appeals departed from significant prior rulings of this Court and placed

[15]The flood of litigation that will inundate the federal courts if the decision of the Court of Appeals is permitted to stand is not hypothetical or imagined. The *Sylvania* court cited an "avalanche" of precedents dealing with this question. (537 F.2d at 997). Many of these cases were disposed of by the District Courts on pretrial motions to dismiss for failure to state a claim. See, *e.g., Ace beer Distributors, Inc. v. Kohn, Inc., supra; Schwing Motor Co. v. Hudson Sales Corp., supra; Top-Ali Variety, Inc. v. Hallmark Cards, Inc., supra; E. A. Weinel Construction Co. v. Mueller Co.*, 289 F.Supp. 293 (E.D.Ill. 1968). If each of these cases is required to be tried on the merits, which is the upshot of the ruling of the Court of Appeals in the case at bar, the dockets of the federal courts would be jammed with antitrust suits filed by unsuccessful franchise applicants. Before this burden is cast on the district courts, this Court should determine whether a case can proceed without alleging anything more than the claimed unreasonableness of a typical vertical exclusive franchise.

itself in conflict with rulings of other Courts of Appeals in similar cases.

The fundamental predicate for the decision in *GTE Sylvania Inc. v. Continental T.V., Inc., supra,* in which this Court granted certiorari on October 18, 1976 (45 Law Week 3299), was the established legality of the exclusive franchise. The *Sylvania* court relied on the "veritable avalanche of precedent to the effect that, absent sufficient evidence of monopolization, a manufacturer may legally grant such an exclusive franchise, even if this effects the elimination of another distributor."[16] It then reasoned (537 F. 2d at 997-8):

> "The clearly established legality of exclusive dealerships compels the conclusion that location causes cannot be *per se* illegal. If it is legal for a manufacturer to promise one dealer that he will have the exclusive right to sell the manufacturer's products within a designated territory, then obviously it is legal for that manufacturer to keep his promise of exclusivity by denying other dealers like Continental the power to sell from retail outlets at unauthorized locations within the first dealer's exclusive territory. The accepted principle that a manufacturer may legally grant an exclusive dealership is rendered meaningless if he cannot legally use a location clause to prevent his other dealers from opening their own retail outlets in the same area."

Since a "location clause" is merely a method to enforce an underlying exclusive dealing arrangement,[17] it would be a moot exercise for this Court to pass upon the legality of

[16] 537 F.2d at 997, citing one-half page of decisions supporting its general statement of the law.
[17] *Sylvania, supra,* 537 F.2d at 997.

the location clause in the *Sylvania* case while leaving the Circuit Courts in conflict on the question of the lawfulness of the underlying exclusive dealing arrangement. The questions are inextricably bound together and this Court should grant certiorari in the case at bar so that both questions can be resolved at the same time.

The *Sylvania* decision was an outgrowth of a long line of decisions validating exclusive dealing arrangements. At the head of this line of cases is this Court's decision in *United States v. Arnold, Schwinn & Co., supra.* In that case, Schwinn had developed a practice of franchising approved retail outlets for designated locations, limiting the number of such outlets in any particular area. Each of the retail outlets was served by a designated Schwinn distributor who agreed with Schwinn to sell only to franchised Schwinn accounts and only in its designated territory, which had been allocated on an exclusive basis. Although striking down the territorial and customer restraints on the Schwinn distributors, this Court observed (388 U.S. at 376):

> "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. [Citing, *United States v. Colgate & Co.*]. If the restraint stops at that point—if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act."

This same result has been reached in numerous Circuit Court decisions as well. For example, the court in *Bushie*

v. Stenocord Corp., 460 F. 2d 116, 119-20 (9th Cir. 1972), ruled:

> "A manufacturer is free to agree with a third party to give him an exclusive distributorship 'even if this means cutting off another distributor,' * * * so long as in doing so there would be no resulting restraint of trade. * * *."

Similarly, in *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F. 2d 1093, 1094 (3rd Cir. 1972), the court, in affirming summary judgment granted in favor of a manufacturer, said:

> "[I]t is indisputable that a single manufacturer or seller can ordinarily stop doing business with A and transfer his business to B and that such a transfer is valid even though B may have solicited the transfer and even though the seller and B may have agreed prior to the seller's termination of A."

In *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F. 2d 637 (10th Cir. 1973), *cert. denied* 411 U.S. 987 (1973), Febco, a manufacturer of lawn and turf equipment, entered into a written agreement whereby a distributor, Thompson, became the exclusive distributor for the entire state of Colorado and some adjacent territory. In upholding the exclusive, the court said (472 F. 2d at 640):

> "A manufacturer may select the customers to whom he will sell so long as his conduct has no monopolistic or market control purposes. * * * We have nothing more than a vertical confinement of sales to a selected customer of a product which is competitively available from others. This is not enough to establish a Sherman Act violation."

Finally, in *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F. 2d 283, 286 (6th Cir. 1963), the court sustained a grant of judgment on the pleadings in favor of the defendants where they were charged by the plaintiff with secretly agreeing to substitute Kohn, Inc. as an exclusive distributor in place of the plaintiff, commenting:

> "A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. * * * A refusal to deal becomes illegal under the Act only when it produces an unreasonable elimination of competition or the creation of a monopoly."

See also, *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 76 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970); *Williams v. Independent News Co.*, 485 F. 2d 1099, 1104 (3rd Cir. 1973); *Wilson v. I.B.E. Industries*, 510 F. 2d 986, 989 (5th Cir. 1975).[18]

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[18]Several District Courts have also passed on the question. In *E. A. Weinel Construction Co. v. Mueller Co., supra*, the court granted judgment on the pleadings in favor of the manufacturer, commenting (289 F. Supp. at 298-9):

> "An exclusive agency or dealership necessarily involves a limited monopoly to sell the product of the manufacturer in the area covered by the exclusive agreement. Such limited monopolies are valid unless they are used to violate the antitrust laws. * * *
>
> "The fact that any other dealers in the same product of the same manufacturer are eliminated does not make the exclusive dealership illegal; it is the essential nature of the arrangement. The fact that the exclusive dealer asked for the arrangement does not make it illegal."

Top-All Varieties, Inc. v. Hallmark Cards, Inc., 301 F.Supp. 703 (S.D. N.Y. 1969), also involved the dismissal for failure to state a claim of an action challenging an exclusive dealership arrangement. In dismissing the complaint, the court observed: "It is plain that an agreement between a manufacturer and a distributor setting up an exclusive territorial distributorship does not in itself violate the Sherman Act." (*Id.* at 704). See also, *Western Wholesale Liquor Co. v. Gibson Wine Co.*, 372 F.Supp. 802, 805-07 (D.S.D. 1974); *Peerless Dental Supply Co. v. Weber Dental Mfg. Co.*, 283 F.Supp. 288, 289-90 (E.D.Pa. 1968); *L.S. Good & Co. v. H. Daroff & Sons, Inc.*, 263 F.Supp. 635, 646-7 (N.D.W.Va. 1967).

One of the two most frequently cited automobile distributorship cases on this point is the Fourth Circuit's decision in *Schwing Motor Co. v. Hudson Sales Corp., supra.* The plaintiffs in that case were two established Hudson dealers in the Baltimore area who alleged that an agreement between Hudson and a third dealer to terminate the dealerships of the plaintiffs and give the third dealer an exclusive in the Baltimore area was in violation of the antitrust laws. In granting the defendants' motion to dismiss the complaint for failure to state a claim, the court commented (138 F. Supp. at 903):[19]

> "A manufacturer may prefer to deal with one person rather than another, and may grant exclusive contracts in a particular territory. * * *
>
> "An exclusive agency or dealership necessarily involves a limited monopoly to sell the product of a manufacturer in the area covered by the exclusive agreement. Such limited monopolies are not invalid [citing cases] unless they are used to violate the antitrust laws. They may not be used to extend the producer's monopoly into other fields, e.g. the financing of General Motors automobiles [citing cases]. Nor may they be used to establish market dominance and drive out the products of competitors. [Citing cases.] *But the mere fact that such an agreement necessarily gives the dealer a monopoly in handling the product of the particular manufacturer in a given area, and thereby enables the dealer to dictate the price at which the products of that manufacturer shall be sold in that area, subject to competition with the products of other manufacturers, does not condemn such agreements; otherwise all exclusive agency agreements would be illegal per se.* [Citing cases.]" (Emphasis added).

[19]The trial court's opinion was adopted as the opinion of the Court of Appeals (239 F.2d at 177).

The second leading case in the automobile area, decided just a year later, *Packard Motor Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D.C. Cir. 1957), *cert. denied* 355 U.S. 822, *rehearing denied* 355 U.S. 900 (1957), *rehearing denied* 357 U.S. 923 (1958), involved facts similar to *Schwing*. The largest of three Packard dealers in the Baltimore area told Packard it would resign its Packard dealership unless Packard made its dealership exclusive. Packard then terminated the other two dealers, one of whom brought the action. The case was decided on substantially the same grounds as *Schwing*. The court made the same points about relevant markets ("Since there are other cars 'reasonably interchangeable by consumers for the same purposes' as Packard cars, and therefore in competition with Packards, an exclusive contract for marketing Packards does not create a monopoly.") (243 F. 2d at 420) and about vertical arrangements ("The fact that Zell asked for the arrangement does not make it illegal. Since the immediate object of an exclusive dealership is to protect the dealer from competition in the manufacturer's products, it is likely to be the dealer who asks for it.") (*Id.* at 421).[20]

[20]The Court of Appeals suggests that *Packard* and *Schwing* must be limited to failing or weak companies. (Appendix C, *infra*, p. A20, n. 3). Such a position is supported neither by those decisions nor their progeny. While the *Packard* and *Schwing* courts could have limited their decisions on this narrow ground, they clearly did not. See, "Marketing and Franchising: Antitrust Prognosis for the 70's," 39 Antitrust L.J. 502, 511 (1970). Instead, the courts held that exclusive franchises are prima facie legal. Note, "Restricted Channels of Distribution Under the Sherman Act," 75 Harv. L. Rev. 795, 826 n. 114 (1962). Mr. Justice Brennan's comments regarding *Packard* and *Schwing* in his separate opinion in *White Motor Co. v. United States*, 372 U.S. 253, 269-70 n. 8 (1963), to the effect that those cases should be limited to failing or weak companies, must be read in the light of this Court's subsequent opinion in *Schwinn* holding that "if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the

The Court of Appeals made a three-fold attempt to remove itself from the ambit of the above-cited cases. It first ruled that Quality's assertion that there was no business justification for denying it a Lincoln franchise in the Minneapolis area might render the Prestige exclusive unreasonable. (Appendix C, *infra*, p. A20). None of the decisions discussed above, however, including this Court's opinion in *Schwinn*, made the legality of an exclusive dealing arrangement turn on the presence or absence of a business justification. The decision of the Sixth Circuit in *Ace Beer, supra*, in fact, affirmatively states that business justification is irrelevant, as long as the conduct is not motivated by monopolistic aims (318 F. 2d at 286):

> "A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, *for reasons sufficient to itself*. * * * A refusal to deal becomes illegal under the Act only when it produces an unreasonable elimination of competition or the creation of a monopoly." (Emphasis added).

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merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act." (388 U.S. at 376). Nothing in *Schwinn* limits this holding to failing or weak companies, and, of course, Schwinn was neither.

> "Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a 'failing company.' On the contrary, it was the leading bicycle producer in the nation."

Id. at 374. See also *Top-All Varieties, Inc. v. Hallmark Cards, Inc., supra* (involving the "leading" greeting card company); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., supra* (involving one of the leading distillers of liquor); *Richardson v. Chrysler Motor Corp.*, 257 F.Supp. 547 (S.D.Tex. 1966) (involving one of the "big three" automobile manufacturers); and *Cartrade, Inc. v. Ford Dealers Advertising Association*, 446 F.2d 289 (9th Cir. 1971), *cert. denied* 405 U.S. 997 (1972) (involving an association of the dealers of one of the "big three" automobile manufacturers). Petitioners are aware of no case, other than the one at bar, where the court has refused to apply the *Schwing* and *Packard* rationale because the manufacturer involved was in a strong competitive position.

Second, the Court of Appeals also found it was significant in the case at bar that Prestige, under its agreement with Ford, had sole discretion to determine whether a horizontal competitor could enter the Minneapolis market. (Appendix C, *infra*, pp. A20-A21). The exclusive dealing arrangements validated in *Schwing, Packard, Ark Dental, Colorado Pump, Bushie*, and the other cases discussed above all gave the exclusive franchisees the same discretion. Indeed, any exclusive dealing arrangements would have that effect. That, of course, is not only the effect of every exclusive dealing arrangement, but it is the very purpose of such an agreement. See *GTE Sylvania Inc. v. Continental T.V., Inc., supra*, 537 F. 2d at 1002 n. 37. This is not to say, however, as the Court of Appeals did (Appendix C, *infra*, p. A21), that such an effect converts a vertical arrangement into a horizontal one condemned by *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F. 2d 1230 (3rd Cir. 1975). A purely vertical agreement which has the effect of eliminating horizontal competitors, contrary to the Court of Appeals decision in the instant case, cannot be equated to a conspiracy among horizontal competitors to eliminate competition.

Nowhere in the complaint in the case at bar is it alleged that Ford is a mere instrumentality of its dealers or that two or more Lincoln dealers have agreed to allocate territories. All that is alleged is that a single dealer entered into an exclusive dealing arrangement with a single manufacturer. Under these circumstances, it is conceptually impossible to conclude that any "horizontal" restraint has occurred:

> "One of the classic examples of a per se violation of §1 is an agreement between *competitors at the same level of the market structure* to allocate territories in order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contradistinction to combinations of *persons at different levels of the market structure*, e.g. manufacturers and distributors, which are termed 'vertical' restraints." (Emphasis added).

United States v. Topco Associates, Inc., supra, 405 U.S. at 608. Since the arrangement between Ford and Prestige was clearly a "vertical," not "horizontal," agreement, the *Topco* and *American Motor Inns* cases are inapposite.

Finally, the Court of Appeals relied upon its somewhat exaggerated conclusion that Quality had pled an exclusive franchise of a "perpetual" nature. (Appendix C, *infra,* p. A22).[21] None of the decisions discussed above, however, including this Court's decision in *Schwinn,* make the legality of an exclusive dealing arrangement turn on the reasonableness of the duration of the franchise. This novel

[21]In its search to find some basis for a claim in the complaint, the Court of Appeals simply went too far in this regard. There is absolutely no predicate in the pleadings for this conclusion. Nowhere in Quality's complaint is it alleged that the exclusive arrangement between Ford and Prestige was of perpetual duration. Moreover, Quality's claim to this effect in the Court of Appeals was clearly disingenuous. In truth, the 1962 letter agreement between Ford and Prestige, which was identified by the president of Quality at his deposition as the letter referred to in Paragraph 17(c) of the complaint, provides:

> "If you become the Lincoln-Mercury dealer as a replacement for Mitchell & Boyer, Inc., we would not propose any additional Lincoln representation in Minneapolis for at least two years and then only if Lincoln penetration of Price Class is less than District Average."

Thus, the exclusive was guaranteed to Prestige for only two years and its continued existence thereafter was specifically tied to market conditions. Quality not only failed to allege that the exclusive was of a perpetual nature, but it could not have done so consistent with Rule 11 of the Federal Rules of Civil Procedure.

and unprecedented aspect of the Court of Appeals decision is an open invitation for lawsuits claiming that any successful exclusive is an illegal restraint because it has been in effect unreasonably long.

CONCLUSION

In protracted or complex cases, such as the one at bar, the Courts, not only to lighten the burden and expense of such cases to the litigants, but also to free their own dockets for meritorious claims, must closely scrutinize the pleadings to be certain that some basis for a claim is stated upon which relief can be granted.[22] The rationale for closely scrutinizing the pleadings in complex cases was well-stated by Judge Dawson in the Seminar on Protracted Cases:[23]

> "The filing of a complaint in a federal court is, in effect, a license to the plaintiff to subject the defendant to the expense and difficulties of extensive discovery proceedings. The least that can be expected is that the plaintiff, as a condition of getting this license, should be able to set forth in a complaint a short and plain statement of the plaintiff's claim against the defendant, showing that the plaintiff is entitled to relief against the defendant. (Rule 8(a), Rules of Civil Procedure).
>
> "Since the 'big case' almost necessarily pre-supposes 'big' discovery, it may indeed be necessary that the complaint set forth the basis of the claim with more precision than the ordinary run-of-the-mill case.

[22]2A Moore's Federal Practice ¶ 8.13, p. 1708 ("What is a 'short and plain' statement depends, of course, on the circumstances of the case. For example, a complaint for conversion, or to recover on a note, can be stated in half a page. On the other hand, a complaint dealing with a complex matter, as in an antitrust action, * * * will be more extended and may require more particularity.") (Footnotes omitted).

[23]"Seminar on Protracted Cases," 23 F.R.D. 319, 431-32 (1958).

> * * * A person would have to be particularly naive if he did not realize that today certain lawsuits are started and discovery proceedings instituted not so much to secure recovery at a trial as to create sufficient expense and harassment to the adversary to force a settlement for a substantial nuisance value."

In overruling the District Court in the case at bar, the Court of Appeals held that Quality had made a sufficient showing in its pleadings to be granted a license to expose Ford and Prestige to the burden and expense of discovery and trial. In reaching this result, the Court of Appeals placed itself in conflict with decisions of other Courts of Appeals and this Court on the same subject and opened the door to protracted litigation in the district courts in every case where an application for a franchise is rejected on the ground that the franchisor has already granted an exclusive franchise in the area where the applicant seeks to locate his business.

For the foregoing reasons, this Court should grant a writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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December 1976.

APPENDIX A

United States District Court
District of Minnesota
Fourth Division

Quality Mercury, Inc.,
Plaintiff,

vs.

Ford Motor Company, Ford Marketing Corporation, Prestige Lincoln-Mercury, Inc., N. Grossman, and H. I. Grossman,
Defendants.

4-74 Civ. 477.

MEMORANDUM ORDER

(Filed in U.S. District Court June 3, 1975)

Defendants Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman move the Court for an Order granting them judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. They make this motion on the ground that plaintiff's complaint fails to state a cause of action upon which relief may be granted.

Plaintiff Quality Mercury, Inc. (Quality), is an authorized Mercury dealership located in Bloomington, Minnesota, a suburb of Minneapolis. It has operated continuously since January 1968. It sells and leases Mercury line of automobiles as well as used cars and a foreign made auto-

mobile. It also provides repairs for customers and sells parts and accessories. It asserts that its "dealer's locality" is the Minneapolis market which covers Hennepin County and adjacent areas. It considers its primary market to be South Minneapolis and the Southern Minneapolis suburban area.

Defendants in this case are Ford Motor Company, Ford Marketing Corporation (known hereafter collectively as Ford), and Prestige Lincoln-Mercury, Inc., and two of its principal shareholders and officers, N. Grossman and H. I. Grossman (known hereafter collectively as Prestige).

Ford Motor Company is a major manufacturer of automobiles, including the Mercury and Lincoln lines. Ford Motor Company sells its automobiles through the Ford Marketing Corporation to authorized Ford dealers.

Defendant Prestige is a Lincoln-Mercury dealership located in St. Louis Park, Minnesota, a western suburb of Minneapolis. It has operated continuously since 1962. It sells and leases Lincoln and Mercury automobiles as well as used automobiles. It also provides repair service and sells parts and accessories. Prestige asserts in its answer that its "dealer's locality" for the Mercury line is 43% of Hennepin, Anoka and Isanti counties and for the Lincoln line Hennepin, Anoka, Carver, Isanti and Scott counties. Prestige asserts that its primary market area includes the entire Twin City metropolitan area for both the Lincoln and Mercury line of automobiles.

Plaintiff asserts in its complaint that the defendants have combined and conspired to restrain trade and commerce in violation of §1 of the Sherman Act, 15 U.S.C. §1, by maintaining Prestige as the sole Lincoln dealership in the Minneapolis area and by denying Quality a franchise to sell Lincolns. Plaintiff seeks by this action "judgment that de-

fendant Ford Motor or Ford Marketing, or both, enter into a standard Lincoln dealership agreement with plaintiff so that plaintiff can sell the Lincoln line of automobiles and related parts and services from plaintiff's place of business." Complaint, p. 6. It also seeks judgment of an undisclosed amount of damages.

In reviewing a motion to dismiss for failure to state a claim, all well-pleaded allegations of facts must be accepted as true and the plaintiff is entitled to the benefit of all reasonable inferences arising therefrom. *Collins v. Handyman,* 341 U.S. 651 (1952), and *L. S. Good & Company v. H. Daroff & Sons, Inc.,* 263 F.Supp. 635 (N.D. W. Va. 1967).

In its complaint Quality asserts that Ford and Prestige have violated the antitrust laws by maintaining Prestige as the sole Lincoln dealership in the Minneapolis market with no other purpose than to insulate Prestige from intrabrand competition. It asserts the following acts by the defendants in furtherance of the conspiracy: (1) granting Prestige the sole Lincoln dealership nothwithstanding determinations by both Ford and Prestige that there is a need for another Lincoln dealership in the Minneapolis area; (2) refusing to grant plaintiff a Lincoln dealership notwithstanding the policy of Ford's Lincoln-Mercury division that its supervised dealers should sell both lines of automobiles; and (3) representing to plaintiff that a letter from an agent of Ford to Prestige dated April 11, 1962, is a binding contract which prevents Ford from franchising an additional Lincoln dealership in the Minneapolis area despite Ford's policy of franchising additional Lincoln dealers at sites which are more than 10 miles from an existing Lincoln dealer.

It is clear that an agreement between a manufacturer and a distributor setting up an exclusive territorial distributorship in and of itself does not violate the Sherman Act even if the impetus for the exclusive agreement comes from the distributor. *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), *aff'd* 239 F.2d 176 (4th Cir. 1956), *cert. denied* 355 U.S. 823 (1957) (automobile exclusive franchise case); *Packard Motor Car Company v. Webster Motor Car Company*, 243 F.2d 418 (D.C. Cir. 1957), *cert. denied* 355 U.S. 822, *rehearing denied*, 355 U.S. 900 (1957), *rehearing denied*, 357 U.S. 923 (1958) (automobile exclusive franchise case); *L. S. Good & Company v. H. Daroff & Sons, Inc., supra* (clothing exclusive franchise case), and *Western Wholesale Liquor Company v. Gibson Wine Company*, 372 F. Supp. 802 (D. S.Dak. 1974) (liquor wholesale distributor exclusive franchise case).

The Supreme Court stated in discussing exclusive franchises or vertical monopolies:

> ". . . [A] manufacturer of a product, other and equivalent brands of which are readily available in the market, may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. Cf. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). If the restraint stops at that point—if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the

> Sherman Act." *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967).

Plaintiff agrees that a manufacturer can deal unilaterally with whomever it pleases. However, it asserts that the issue raised in the complaint is not whether Ford can unilaterally grant an exclusive franchise to Prestige, refuse to deal with Quality and thereby create a vertical monopoly. It asserts that the real issue is whether Prestige can "prevent" Ford from granting Quality a Lincoln dealership in an area that needs one, thereby creating an illegal horizontal monopoly.

Plaintiff suggests that the kind of monopoly alleged to exist here is similar to those found to be in violation of the antitrust laws in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 1973-2 Trade Cases, Para. 74,685 (D. N.J. 1973).

In *Sealy, supra*, the Supreme Court found illegal the territorial limitations created in a plan whereby licensor, controlled by its licensees which owned substantially all of the licensor's stock, granted mutually exclusive territories for the manufacture and sale of mattresses and bedding products under licensor's name and trademark. The Court found that this allocation of territories was part of an aggregation of trade restraints that included unlawful price fixing and therefore in violation of the antitrust laws.

In *Topco, supra*, an association of small and medium sized regional supermarket chains had organized themselves along the lines of the licensor and licensees in *Sealy*.

Under the Topco plan each Topco member was granted an area in which they had the exclusive or de facto exclusive license to sell Topco brand products. Topco members were allowed to sell Topco goods at wholesale prices only with special permission of the Association and then only within the specific geographical area designated.

Topco members also owned all of the voting stock of Topco Associates, Inc., and the Topco Board of Directors were all executives or officers of Association members. When applying for admission into the Topco Association an applicant had to be approved by an affirmative vote of 75% of the Association's members. If, however, the member whose operations were the nearest to those of the applicant or any member whose operations were located within 100 miles of the applicant, voted against approval, an affirmative vote of 85% was required.

The Supreme Court found that the overall impact of these restraints constituted an illegal horizontal restraint and held that these practices were a per se violation of the Sherman Act.

In *American Motor Inns, Inc. v. Holiday Inns, Inc., supra,* the District Court found that the market effect of three practices of Holiday Inns, Inc., and its franchisees violated the antitrust laws. Holiday Inns, Inc., followed a practice of allowing existing Holiday Inn franchisees to object to the granting of a new franchise in their market area. In practice, the Court found that an objection meant a disallowed application. Holiday Inns, Inc., also required franchisees to agree not to own or operate another inn or motel while operating a Holiday Inn. Holiday Inns, Inc., also had a policy of establishing company owned franchises in certain areas and of not allowing other non-company franchises to compete with the company owned inns.

The Court held:

> "Regardless of the market effect of each of these devices standing alone, however, their combined effect and the totality of their operation results in a horizontal allocation of territories." *Id.*, at p. 95,027.

The Court did not hold that the radius letter policy in and by itself was a violation of the antitrust laws but stated that it was "a means of allocating territories horizontally so as to reduce intra-brand competition among HI [Holiday Inns] franchisees." *Id.*

This Court does not find the policies and practices of the defendants as set forth in the complaint similar to those set forth above. In its complaint Quality has not alleged any illegal ramification of the exclusive franchise enjoyed by Prestige such as the price fixing found in *Sealy, supra.* Nor is there alleged any overall scheme by which the existing Lincoln dealers control the Board of Directors of Ford or set criteria on marketing areas, vote upon who may be accepted as new franchisees or limit territories such as those found in *Topco, supra.*

This Court also does not find the allegations in Quality's complaint similar to the situation that existed in *American Motor Inns, supra.* There are no allegations that Mercury dealers are prohibited from selling other lines of automobiles while also selling Mercury automobiles. Indeed, Quality states in its complaint that it also carries a line of foreign made automobiles along with Mercury automobiles. Complaint, p. 3. There are also no allegations of market-

ing areas exclusively reserved for company owned franchises such as existed in *American Motor Inns, supra.*

Instead, the facts in this case as pleaded by plaintiff can be more readily compared with the factual situations in *Schwing Motor Co. v. Hudson Sales Corp., supra,* and *Packard Motor Car Company v. Webster Motor Car Company, supra.*

In *Schwing, supra,* the plaintiffs were two established Hudson dealers in the Baltimore, Maryland, area who alleged that an agreement between Hudson and a third dealer to terminate the dealerships of the plaintiffs and give the third dealer an exclusive franchise in the Baltimore area, was in violation of the antitrust laws. The Court granted the defendants' motion to dismiss the complaint for failure to state a claim. It found that "every manufacturer has a natural and complete monopoly of his particular product." 138 F. Supp. at 902. It also held that "[a]n exclusive agency or dealership necessarily involves a limited monopoly to sell the product of the manufacturer in the area covered by the exclusive agreement." *Id.* at 903.

In *Packard, supra,* the franchises of two dealers were terminated by Packard on the insistence of a third dealer in the same geographical area. The Court also ruled for the defendants and added that the fact the third and remaining distributor had insisted upon the exclusive franchise did not make it illegal.

This Court concludes that the plaintiff has pled only an exclusive franchise agreement between Prestige and Ford of the variety found to be legal in *Schwing, supra,* and *Packard, supra.* The Court also finds a close resemblance to the situation pled in plaintiff's complaint and those

found to be legal in *Top-All Variety, Inc. v. Hallmark Cards, Inc.,* 301 F. Supp. 703 (S.D. N.Y. 1969) (exclusive franchise in the greeting card industry), and *Ace Beer Industries v. Kohn, Inc.,* 318 F.2d 283 (6th Cir. 1963) (exclusive franchise in beer distribution).

As a second and alternative ground for dismissing plaintiff's complaint against the moving defendants for failure to state a cause of action, the Court finds the injury alleged in plaintiff's complaint insufficient to state a cause of action under § 1 of the Sherman Act.

In granting defendants' motion to dismiss for failure to state a claim upon which relief can be granted, the Court in *Schwing, supra,* stated:

> "The main purpose of the anti-trust laws is to protect the public from monopolies and restraints of trade, and the individual right of action for treble damages is incidental and subordinate to that main purpose. [Citations omitted.] Public injury alone justifies the threefold increase in damages. It is essential, therefore, that the complaint allege facts from which it can be determined that the conduct charged to be in violation of the anti-trust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." 138 F. Supp. at 903.

Quality in its complaint makes only the most general and vague allegations of injury to the public resulting from the alleged illegal conduct of the defendants. It asserts only that the public is being deprived of a needed

Lincoln deaership and the benefits of competition that would result from such an outlet. Complaint p. 6. Furthermore, there are no allegations of interbrand restraints because of the activities of the defendants. Plaintiff admits in its complaint that the Lincoln line of automobiles are "high-priced, luxury automobiles, competing with Cadilac and Chrysler Imperial." Complaint p. 2. What the plaintiff does allege is loss of profit and business to itself.

It is clear that damage to Quality alone does not make an exclusive dealership illegal. The Court in *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283, 286-7 (6th Cir. 1963), stated:

> "A manufacturer has a right to select its customers and to refuse to sell its goods to anyone, for reasons sufficient to itself. [Citation omitted.] A refusal to deal becomes illegal under the Act only when it produces an unreasonable restraint of trade, such as price fixing, elimination of competition or the creation of a monopoly. [Citation omitted.] The fact that a refusal to deal with a particular buyer without more, may have an adverse effect upon the buyer's business does not make the refusal to deal a violation of the Sherman Act. Damage alone does not constitute liability under the Act."

Accord, E. A. Weinel Construction Co. v. Mueller Co., 289 F. Supp. 293, 298 (E.D. Ill. 1968); *Potter's Photographic Applications Co. v. Ealing Corp.*, 292 F. Supp. 92, 104 (E.D. N.Y. 1968), and *Top-All Varieties, Inc. v. Hallmark Cards, Inc., supra.*

It Is Ordered:

1. That the motion of defendants Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman for judgment on the pleadings is granted.

June 3, 1975.

/s/ EARL R. LARSON
United States District Judge

APPENDIX B

United States District Court
District of Minnesota
Fourth Division

Quality Mercury, Inc.,

Plaintiff,

vs.

Ford Motor Company, Ford Marketing Corporation, Prestige Lincoln-Mercury, Inc., N. Grossman, and H. I. Grossman,

Defendants.

4-74 Civ. 477.

ORDER

(Filed in U.S. District Court July 11, 1975)

The above-entitled matter came on for hearing before the Honorable Earl R. Larson, Judge of the above-named

Court, on July 9, 1975 at 8:45 a.m. on the motion of defendants Ford Motor Company and Ford Marketing Corporation for judgment on the pleadings. Dorsey, Marquart, Windhorst, West & Halladay by Lynn Krominga appeared for the moving defendants; Cox, King & Stern by Charles A. Cox appeared for the plaintiff; Leonard, Street & Deinard by Charles A. Mays appeared for defendant Prestige Lincoln-Mercury, Inc. The Court having considered the motion and arguments of counsel, and upon all the files, records, and proceedings herein.

It is Ordered:

That the motion of defendants Ford Motor Company and Ford Marketing Corporation for judgment on the pleadings is granted.

Dated July 10, 1975.

/s/ EARL R. LARSON
United States District Judge

APPENDIX C

United States Court of Appeals
For The Eighth Circuit

Nos. 75-1489 and 75-1602

Quality Mercury, Inc.,

Appellant,

vs.

Ford Motor Company, Ford Marketing Corporation, Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman,

Appellees.

Appeal from the United States District Court for the District of Minnesota.

Submitted: February 11, 1976

Filed: September 27, 1976

Before LAY, HEANEY and STEPHENSON, Circuit Judges.

LAY, Circuit Judge.

Quality Mercury, Inc. appeals from the district court's grant of judgment on the pleadings in favor of the defendants pursuant to Fed. R. Civ. P. 12(c).

The pleaded facts may be summarized as follows. Quality is an automobile dealer in Bloomington, Minnesota, a

suburb of Minneapolis. It sells Mercury automobiles which are manufactured by defendant Ford Motor Co. and marketed by the Lincoln-Mercury division of defendant Ford Marketing Corp. Under an agreement with Quality, Lincoln-Mercury may franchise another Mercury dealer only if the other dealer's place of business is more than ten miles from Quality's.

Defendant Prestige Lincoln-Mercury, operated by defendants N. Grossman and H. I. Grossman, sells Mercury and Lincoln automobiles in St. Louis Park, Minnesota, within the Minneapolis area but more than ten miles from Quality.

Quality, which has not been franchised to sell Lincolns, contends that no franchise had been allowed because in 1962, before Quality was in existence, Ford bound itself not to create another Lincoln dealership in the Minneapolis area without Prestige's consent. Quality contends that this in effect grants Prestige a contract in perpetuity and unlawfully prevents Ford from awarding Quality a Lincoln dealership.

Quality asserts further that this agreement is an unlawful combination and conspiracy to restrain trade in violation of § 1 of the Sherman Act. As a result Quality contends it has been damaged, and "the public has and will continue to be injured by being deprived of a needed Lincoln outlet for sales, leasing and service in a large and significant trade area and the benefits of competition that would result from such an outlet." Quality prays for treble damages and injunctive relief.

The Prestige defendants (Prestige and the two Grossmans) filed an answer denying many of Quality's allega-

tions. They admitted that, to induce the Grossmans to operate a Lincoln dealership, Ford promised not to open any Lincoln dealerships in Minneapolis for two years, and thereafter to do so only if "Lincoln penetration of Price Class in Minneapolis locality is less than District Average."[1] In fact, Prestige asserts, Ford allowed two Lincoln dealerships in the Minneapolis area after it franchised Prestige. The Ford defendants filed a separate answer, substantially denying all of the allegations of the complaint.

Prestige and Ford both moved for judgment on the pleadings. Their motions were granted and Quality has appealed.

I.

Section 1 of the Sherman Act, 15 U.S.C. § 1, reads, in part, as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

In *Northern Pacific Ry. v. United States*, 356 U.S. 1 (1958), the Supreme Court discussed the general purpose of the antitrust laws:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserv-

[1]There is a conflict between the parties as to the character of the Ford obligation to refrain from creating another Lincoln dealership in the area. Quality has taken the position, emphasized strongly on appeal, that Ford agreed never to grant another Lincoln franchise in the area. Ford contends, in contrast, that the restriction was as indicated in the text.

> ing free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Id. at 4.

We must construe all well pleaded factual allegations of the Complaint as true and draw in favor of Quality all reasonable inferences and intendments from these facts. See *National Metropolitan Bank v. United States,* 323 U.S. 454 (1945). In so construing the complaint, we find it alleges that Ford and Prestige have bound themselves to an arrangement whereby a horizontal competitor (Prestige) has a perpetual veto power over all applications for Lincoln franchises in the Minneapolis area, thus interfering with the "unrestrained interaction of competitive forces" in the Minneapolis automobile market.

With this construction of the complaint we must decide whether the plaintiff has stated a proper claim for relief under the antitrust laws.

Our initial inquiry is whether plaintiff has alleged, under § 1 of the Sherman Act, a "contract, combination . . . or conspiracy" in restraint of trade. If Ford's refusal to deal with Quality was merely a unilateral or independent decision there would be no such contract. *See United States v. Colgate & Co.,* 250 U.S. 300 (1919). However, if more than mere unilateral action was involved, then Ford has created a combination. See *Albrecht v. Herald Co.,* 390

U.S. 145 (1968); and *United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960).

In order for Quality to show a "contract, combination . . . or conspirary," it was not necessary to plead a formal agreement between Ford and Prestige. An allegation that their conduct was "joint or collaborative" was sufficient. *See United States v. General Motors Corp.,* 384 U.S. 127 (1966); *Reed Brothers, Inc. v. Monsanto Co.,* 525 F.2d 486 (8th Cir. 1975), *cert. denied,* 96 S.Ct. 787 (1976); *American Motors Inns, Inc. v. Holiday Inns, Inc.,* 521 F.2d 1230 (3d Cir. 1975); and *Ford Motor Co. v. Webster's Auto Sales, Inc.,* 361 F.2d 874 (1st Cir. 1966). *Cf. United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 391 n. 12 (1967) (Stewart, J., dissenting). Thus, whether an unlawful combination or conspiracy existed was to be judged by Ford's and Prestige's words and actions and not by the terms of the agreement. *See United States v. Parke, Davis & Co., supra;* and *American Holiday Inns, Inc. v. Holiday Inns, Inc.,* 365 F. Supp. 1073, 1090 (D. N.J. 1973), *aff'd. in part,* 521 F.2d 1230 (3rd Cir. 1975). Accepting Quality's allegations as true and applying the foregoing principles, we conclude that Ford's action in denying Quality's application was not taken unilaterally, but rather "jointly or collaboratively" with its franchisee, Prestige.

However, not all "contracts, combinations . . . or conspiracies" in restraint of trade are unlawful. We must therefore determine whether the alleged restraint has some factual underpinning upon which it might be declared unreasonable.[2]

---

[2]Quality does not contend that the defendants conduct is a *per se* violation of § 1 of the Sherman Act. Therefore our inquiry is whether the alleged restraint is unlawful under the rule of reason.

In holding that vertical agreements granting exclusive franchises to dealers were not violative of antitrust laws, the district court relied on several decisions which have held that a manufacturer may terminate a distributorship held by one party and transfer it to another without violating the Sherman Act. Moreover, the manufacturer may consult with the new distributor, and, prior to termination of the old distributor, reach agreement with him about the termination and transfer. *See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) and cases there cited; *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir. 1957); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957). The essential reasoned analysis behind these cases is that it is not an unreasonable restraint of trade for a franchisor to exercise his independent judgment as to with whom he chooses to deal. As the Supreme Court observed in *United States v. Arnold, Schwinn & Co.*, *supra* at 376:

> [A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. Cf. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). If the restraint stops at that point—if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.

Most of the decisions dealing with further restraints, the issue left unanswered by *Schwinn*, have dealt with terminations or cancellations of dealers by a manufacturer pursuant to an agreement with either a competing or succeeding dealer. In *Schwing Motor Co. v. Hudson Sales Corp.*, *supra*, and *Packard Motor Car Co. v. Webster Motor Car Co.*, *supra*, manufacturers terminated dealerships pursuant to an agreement or understanding with a competing dealer. Both courts held that a manufacturer has a right to select his customers and may agree with one to exclude another, if: (1) the agreement is not a horizontal one between competitors; (2) the manufacturer is not using it to establish market dominance; or (3) the manufacturer is not using it to promote a monopoly.

The *Packard* decision was not unanimous. In his dissent Judge Bazelon emphasized that there was substantial evidence to support the jury's verdict that the cancellation was not a unilateral decision by the manufacturer, but rather resulted from an agreement between the manufacturer and a dealer to eliminate the competing dealers. Judge Bazelon criticized the *Schwing* decision for its restrictive view of the unreasonableness of vertical restraints:

> [That] case would limit the manufacturer's right to select his own customers by the requirement that he make no agreement with one to exclude another. Schwing would recognize this limitation only "if the agreement is a horizontal one between competitors, or if the manufacturer dominates the market in the

> commodity." 138 F. Supp. at page 906. In this I think Schwing is wrong. The Supreme Court has held that, even apart from monopolistic effect, a vertical agreement which excludes a competitor of one of the parties from a substantial market violates § 1 of the Sherman Act.

243 F.2d at 422.[3]

In *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), the Ninth Circuit drew the proper line in determining the reasonableness of vertical restraints. The court observed that the determination of the reasonableness of vertical combinations or conspiracies in restraint of trade should focus on whether its purpose or effect was anticompetitive.[4] We agree with this analysis early supported by Judge Bazelon's dissent.

Quality's complaint alleges that there was no valid business reason for the denial of a new Lincoln dealership in the Minneapolis area. We find this absence, when combined with the allegation that Prestige, a horizontal competitor, could in its sole discretion determine if the Minneapolis market was to be serviced by another Lincoln dealership, renders reasonable the inference of an anticompetitive motive or effect.

[3]Despite Judge Bazelon's dissent, the *Packard* and *Schwing* decisions have been cited as precedent for the proposition that an exclusive franchise is valid as long as it does not constitute a horizontal conspiracy or monopoly. However, in *White Motor Co. v. United States*, 372 U.S. 253, 269 n. 8 (1963), Justice Brennan, concurring, commented that *Packard* and *Schwing* were of limited scope since both Packard and Hudson were small car manufacturers and needed the exclusions in order to enhance their positions in competition with the large automakers. *See also, Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir. 1963); and *Top-All Varieties, Inc. v. Hallmark Cards, Inc.*, 301 F.Supp. 703 (S.D. N.Y. 1969).

[4]In applying this test the court found no violation of the Act since the combination was found to be the result of a legitimate business interest of the manufacturer in "the quality, competence and stability of his distributors." *Id.* at 80. In addition, we note that *Seagram* dealt with the application of a *per se* rule, while our inquiry proceeds under the rule of reason.

The unreasonable character of agreements allowing horizontal competitors to exercise in effect a veto power over a new franchise application was considered in *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 608 (1972); and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975). In the latter case, AMI's application for a Holiday Inn franchise at the Newark Airport was rejected. In considering the application, Holiday mailed written notices of the application to the three Holiday Inn franchises nearest the airport site. These "radius letters" were standard procedure in reviewing applications. The trial court found that a negative response by an existing franchisee was treated as a veto over the application. On appeal Judge Adams said:

> By thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the Elizabeth-Newark market, HI enabled its franchisees already in the Elizabeth-Newark area to divide that market between themselves, thus precluding further intrabrand competition. Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act.

Id. at 1242.[5]

[5]*Holiday Inn* may, of course, be distinguished on its facts. The franchisees in *Holiday Inn* did not possess exclusive franchises. Also the combination was between two or more horizontal competitors and the franchisor, while here the alleged combination was between one horizontal competitor and the franchisor. But we do not consider

In addition to the granting of sole discretion to a *horizontal competitor* as to the entry of another dealership in the Minneapolis area, we find the *character and nature* of this discretionary power an integral aspect in our analysis. A fair construction of Quality's pleadings is that Ford and Prestige violated the Sherman Act by agreeing to an exclusive franchise in *perpetuity*. The granting of a perpetual exclusive franchise is suspect under the Sherman Act, because changes in conditions, unforeseen when the exclusive franchise was granted, may combine to create an anticompetitive effect.[6] Moreover, the suspicion of the perpetual exclusive franchise is intensified in this case by Quality's additional allegation that there were no valid business reasons for the denial of a new Lincoln dealership in the Minneapolis Area.

these differences critical. While the presence of a horizontal conspiracy would render the restraint a *per se* violation of § 1, the absence of a horizontal conspiracy does not automatically render the restraint reasonable. A purely vertical agreement can be an unreasonable restraint in violation of § 1 of the Sherman Act. *See Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969); *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

[6]While there are no decisions finding a Sherman Act violation in a case such as this, persuasive suggestions have been made that such a finding might be proper. *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 704 (1962); Note, *Restricted Channels of Distribution Under the Sherman Act*, 75 Harv. L. Rev. 795 (1962). The position is taken that when a manufacturer goes beyond the simple grant of a franchise and promises an exclusive franchise lasting for some time into the future, its action becomes suspect. A cogent economic analysis is made in the Harvard note:

> When by unilateral decision a manufacturer has appointed only one outlet in a particular area, three principal forces operate to limit the price charged by the outlet for the manufacturer's product. The first is the possibility of interbrand competition. The second is the possibility of intrabrand competition from fellow dealers or distributors outside the outlet's territory; this check will come into play when the outlet's price becomes sufficiently high to overcome the barriers of interterritorial cost that normally serve to keep customers and sellers in their own areas. The third is the possibility of intrabrand competition from within the outlet's own area should the manufacturer decide either to sell there directly or appoint another outlet. The anticompetitive effect of the exclusive franchise lies in its elimination of the last check. Whatever the strength of the other two competitive forces, the dealer or distributor would hardly have sought the exclusive if it did not confer some measure of protection from competition. And when the outlet occupies an entrenched position in the local market—owing to an ideal location, possession of the best retail accounts, or simply status as the sole dealer or distributor of such products in the area—the exclusive may serve to confirm a substantial amount of monopoly power in the outlet. The anticompetitive effect may be aggravated by factors unforeseen when the exclusive was granted. A population influx or change in buying habits may create an increased demand, which in the absence of the exclusive might well lead the manufacturer to establish a second outlet in the area. The exclusive outlet may be content to benefit from the changed conditions by raising price rather than increasing volume.
>
> *In view of the potentially significant anticompetitive effect, it is proper to demand a convincing justification for the manufacturer's going beyond a unilateral decision and binding himself by the promise of an exclusive franchise.*

75 Harv. L. Rev. at 824-25 (emphasis added).

Under these circumstances this case should not have been dismissed by a judgment on the pleadings, and Quality should have been allowed an opportunity to prove the unreasonableness of the restraint.

II.

As an alternative basis for its judgment, the district court held that the complaint was deficient for failing to contain sufficient allegations of public injury. An antitrust complaint must "allege facts from which it can be determined that the conduct charged to be in violation of the antitrust laws was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce." *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 891, 894 (5th Cir. 1954). How-

ever, in determining whether Quality's complaint has satisfied this standard, we are guided by Fed. R. Civ. P. 8(f) which requires us to construe the pleadings to do substantial justice. This principle of construction is particularly appropriate in antitrust cases as was recently observed by the Supreme Court:

> We have held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). And in antitrust cases, where "the proof is largely in the hands of the alleged conspirators," *Poller v. Columbia Broadcasting System Inc.*, 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly. *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 96 S.Ct. 1848, 1853 (1976).

The complaint alleged "the public had and will continue to be injured by being deprived of the needed Lincoln outlet for sales, leasing and service in a large and significant trade area and the benefits of competition that would result from such an outlet." We deem this language sufficient. The purpose of the Sherman Act is the elimination of restrictions on competition. This paragraph alleges that, but for the illegal restraint, there would be competition in the sale, leasing and service of Lincoln automobiles from which the public would benefit. This allegation could be made more specific only by alleging in detail the specific probable effects of increased competition (e.g., reduced

prices, improved service). But such detail in pleading is not required under the federal rules, even in an antitrust case. See Wright & Miller, *Federal Practice and Procedure* § 1228 (1969).

Judgment reversed and remanded to the district court for further proceedings.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX D

15 U. S. C. § 1, pp. 2978-2979:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such re-

sale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

APPENDIX E

United States District Court
District of Minnesota
Fourth Division

Quality Mercury, Inc.,

Plaintiff,

vs.

Ford Motor Company, Ford Marketing Corporation, Prestige Lincoln-Mercury, Inc., H. Grossman, and H. I. Grossman,

Defendants.

4-74 Civ. 477.

COMPLAINT, JURY DEMANDED
(Filed in U.S. District Court October 1, 1974)

I

Jurisdiction, Venue and Parties

1. This complaint is filed and the jurisdiction of this court is invoked under the provisions of Sections 4 and 16 of the Clayton Act, Title 15, United States Code Sections 15 and 26, entitled "An Act to Supplement Existing Laws Against Unlawful Restraints and Monopolies,"

(a) to prevent, restrain and enjoin continuing violations by defendants of Section 1 of the Sherman Act, Title 15, United States Code Section 1, entitled "An Act to Protect

Trade and Commerce Against Unlawful Restraints and Monopolies," and

(b) for damages suffered by plaintiff in its business and property by reason of defendants' violations of Section 1 of the Sherman Act.

2. Plaintiff Quality Mercury, Inc., is a corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1001 Clover Drive, Bloomington, Minnesota.

3. Defendant Ford Motor Company is a corporation organized and existing under the laws of the State of Delaware and may be found in and transacts business in the District of Minnesota.

4. Defendant Ford Marketing Corporation is a corporation organized and existing under the laws of the State of Delaware and may be found in and transacts business in the District of Minnesota.

5. Defendant Prestige Lincoln-Mercury, Inc., is a corporation organized and existing under the laws of the State of Minnesota and may be found in and transacts business in the District of Minnesota.

6. Defendants N. Grossman and H. I. Grossman are individuals residing in the State of Minnesota.

7. Others not made defendants herein have participated as co-conspirators with the defendants in some or all of the offenses charged.

8. Such co-conspirators include, but are not limited to, certain individuals and Gelco, Inc., a corporation organ-

ized and existing under the laws of the State of Minnesota, which may be found in and transacts business in the District of Minnesota.

II

Trade and Commerce Involved

9. Defendant Ford Motor is one of the world's major manufacturers of automobiles. Its various brands and types of automobiles, trucks and other vehicles are marketed through divisions of defendant Ford Marketing. The divisions in turn make the majority of their sales through dealerships. Plaintiff is unaware at this time of the arrangements between Ford Motor and Ford Marketing under which Ford Marketing sells the products of Ford Motor. Defendants Ford Motor and Ford Marketing are involved in interstate commerce.

10. The Lincoln-Mercury division of Ford Marketing markets the Lincoln line of automobiles. This is a high-priced, luxury automobile, competing with Cadillac and Chrysler Imperial. The division also markets the Mercury line of automobiles which includes various types of automobiles ranging from those of standard sizes and prices through intermediates, compacts, sub-compacts, imports and sports cars.

11. The Lincoln and Mercury lines of automobiles together offer virtually every type and price level of automobiles manufactured and marketed in the United States by American manufacturers. The lines complement each other; and having each line available significantly enhances the operation of a dealership by making possible a larger vol-

ume of business, economies of operation, and better service to the public. Because of this, it is established policy of Ford Motor and Ford Marketing that both the Lincoln and Mercury lines be handled by the supervised dealers of the Lincoln-Mercury division, although separate sales agreements are written with dealers for each line of automobile; and of the approximately 1100 supervised dealers of the Lincoln-Mercury division, only a handful are not appointed to sell and service both lines of automobiles.

12. One of the handful is plaintiff Quality Mercury. It has operated at 1001 Clover Drive since January 2, 1968. Quality Mercury sells and has leased the Mercury line of automobiles, sells used automobiles, a foreign-made automobile, and parts and accessories, and provides repairs and other services for customers. The "dealer's locality" of Quality Mercury is the "Minneapolis market" which covers Hennepin County and some additional areas. Its primary market area is south Minneapolis, part of southwest Minneapolis, the south Minneapolis suburbs and part of the southwest Minneapolis suburbs. Under Quality Mercury's sales agreement with the Lincoln-Mercury division, the division may appoint a Mercury dealer with a place of business more than 10 miles from Quality Mercury's place of business; and it is the policy of the Lincoln-Mercury division to appoint additional dealers for the Lincoln or Mercury lines at its discretion if the location of the newly-appointed dealer is 10 miles or more from any existing dealer selling the line of automobile to be sold by the new dealer.

13. Defendant Prestige Lincoln-Mercury operates a

Lincoln-Mercury dealership at 6661 Wayzata Boulevard in St. Louis Park, Minnesota. It sells and leases the entire Lincoln-Mercury line of automobiles, sells used automobiles, parts and accessories, and provides repair and other services for customers. The "dealer's locality" of Prestige Lincoln-Mercury is the "Minneapolis market." Its primary market area is west Minneapolis and part of southwest Minneapolis, the west Minneapolis suburbs and part of the southwest Minneapolis suburbs, and in addition for its Lincoln line north Minneapolis and the north and northeast Minneapolis suburbs. Prestige Lincoln-Mercury began operating a Lincoln-Mercury dealership in 1962. Its location is more than 10 miles from the location of Quality Mercury. It is involved in interstate commerce.

14. Defendants N. Grossman and H. I. Grossman are officers, directors and shareholders of Prestige Lincoln-Mercury and Gelco and directly and effectively control the operations of both corporations.

III

Offenses Charged

15. Commencing in 1962, and up to and including the date of filing this complaint, the defendants have engaged in an unlawful combination and conspiracy to restrain interstate trade and commerce in violation of Section 1 of the Sherman Act.

16. The combination and conspiracy has consisted of a continuing agreement and concert of action to keep Prestige Lincoln-Mercury as the sole Lincoln dealership in the

Minneapolis market in order to reduce and elinninate and prevent competition in the aforesaid interstate trade and commerce.

17. The combination and conspiracy to restrain trade has been effectuated by various means and methods, including but not limited to the following:

a) granting Prestige Lincoln-Mercury the only Lincoln dealership in the Minneapolis market notwithstanding determinations by Ford Motor or Ford Marketing, or both, and Prestige Lincoln-Mercury and defendants N. Grossman and H. I. Grossman that another Lincoln dealership is necessary and desirable in the Minneapolis market, at or near the location of Quality Mercury; and allowing Prestige Lincoln-Mercury the right, in its sole discretion, to determine if the Minneapolis market will be serviced only by its Lincoln dealership.

b) restricting Quality Mercury to selling only the Mercury line of automobiles notwithstanding the policy of the Lincoln-Mercury division that its supervised dealers should sell both Lincolns and Mercurys to enhance the performance and competitive ability of its dealers and to provide diversified products and necessary services to the market.

c) holding out to Quality Mercury that a letter by a district sales manager of Lincoln-Mercury in 1962 to defendants N. and H. I. Grossman is a binding obligation, that it supercedes the policies and rights of defendants Ford Motor and Ford Marketing to authorize additional Lincoln dealers more than 10 miles from an existing Lincoln dealer, that it supercedes the policies and rights of defendants Ford Motor and Ford Marketing to have Lincoln-Mercury dealers sell both Lincolns and Mercurys, and that it prevents the establishment of a Lincoln dealership in an area determined to need such a dealership.

d) granting Prestige Lincoln-Mercury an exclusive dealership in a market which it does not and cannot adequately service with no purpose other than to insulate Prestige Lincoln-Mercury from competition from other Lincoln dealers.

But for the combination and conspiracy, the Lincoln-Mercury division would have entered into a sales agreement with Quality Mercury for Quality Mercury to sell the Lincoln line of automobiles.

IV

Injury to Plaintiff and the Public

18. By reason of the unlawful conduct of defendants alleged above, Quality Mercury has been injured in that:

a) It has lost and will continue to lose profits from sales, leases and other business it would have had in the absence of the violations.

b) It has suffered and will continue to suffer substantial injury to its goodwill.

c) It has been damaged and will continue to be damaged in other respects in its business and property.

19. By reason of the unlawful conduct of defendants alleged above, the public has been and will continue to be injured by being deprived of a needed Lincoln outlet for

sales, leasing and service in a large and significant trade area and the benefits of competition that would result from such an outlet.

Wherefore, plaintiff Quality Mercury prays:

1. Judgment that defendants have combined and conspired to restrain interstate trade and commerce as described herein in violation of Section 1 of the Sherman Act.

2. Judgment that defendant Ford Motor or Ford Marketing, or both, enter into a standard Lincoln dealership agreement with plaintiff so that plaintiff can sell the Lincoln line of automobiles and related parts and services from plaintiff's place of business.

3. Judgment for its damages against each defendant and all of them in an amount to be determined at trial and that, in accordance with law, this amount be trebled. The amount of plaintiff's damages cannot be determined at this time but plaintiff believes it to be a large sum of money.

4. That plaintiff recover from defendants and each of them the costs of this suit, including reasonable attorney's fees, as provided by Section 4 of the Clayton Act.

5. That plaintiff be granted such other, further and different relief as the court may deem just and proper.

Plaintiff demands trial by jury.

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76-871

Supreme Court, U. S.
FILED
JAN 12 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

[redacted]

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS FORD MOTOR COMPANY AND FORD MARKETING CORPORATION IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-781

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENTS FORD MOTOR COMPANY AND FORD MARKETING CORPORATION IN OPPOSITION

I.

OPINIONS BELOW

The opinions of the District Court appear as Appendices A and B to the Petition and are not published. The opinion of the Court of Appeals appears as Appendix C to the Petition, and is reported at 1976-2 Trade Cases ¶ 61,086, — F.2d —.

II.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

III.

QUESTION PRESENTED

Whether, under the liberal construction placed upon the antitrust Complaint herein, the Court of Appeals erred in reversing the District Court's grant of judgment on the pleadings and remanding for further proceedings.

IV.

STATUTE INVOLVED

The statute involved in this litigation is Section 1 of the Sherman Act, 15 U.S.C. §1, which is set forth in Appendix D of the Petition.

V.

STATEMENT

Before this Court, Ford Motor Company and Ford Marketing Corporation (hereinafter collectively referred to as "Ford") take the somewhat unusual position of urging the Court not to grant certiorari from a decision by the Eighth Circuit Court of Appeals adverse to Ford, notwithstanding the contrary request of its co-defendants, Petitioners Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman ("Prestige"). If Ford, like Al Capp's Li'l Abner, had its "druthers," it would have preferred that the Court of Appeals affirm the District Court's judgment in favor of

Ford and Prestige. Nonetheless, we believe it is inappropriate for this Court to examine this case in its present posture.

Respondent Quality Mercury, Inc. ("Quality") has had a Mercury franchise supervised by the Lincoln-Mercury Division of Ford Motor Company. Quality has not had a Lincoln franchise. Prestige has had both Lincoln and Mercury franchises at its location, some 8 or 10 miles distant from Quality. For some time prior to the litigation, Quality had sought a Lincoln franchise. Ford had declined to grant the additional franchise because Prestige had been meeting the conditions imposed by an agreement reflected by a letter dated April 11, 1962.[1]

On October 1, 1974, Quality commenced this action against Ford and Prestige as part of its attempt to obtain a Lincoln franchise. Quality alleged that Prestige and Ford had combined and conspired to restrain trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, by maintaining Prestige as the sole Lincoln

[1]The full text of this partially pleaded 1962 letter was brought to the attention of both the District Court and the Court of Appeals, not for consideration of matters outside of the pleadings but as explanatory of matters pleaded therein. *Austad v. United States*, 386 F.2d 147, 151 (9th Cir. 1967). The letter provided as follows:

> "In connection with your application for Lincoln and Mercury Sales Agreements in Minneapolis, you have inquired concerning our forward plans for the franchising of Lincoln in that market. Our present plan calls for one Lincoln dealer in Minneapolis and one Lincoln dealer in St. Paul.
>
> If you become the Lincoln-Mercury dealer as a replacement for Mitchell & Boyer, Inc., we would not propose any additional Lincoln representation in Minneapolis for at least two years and then only if Lincoln penetration of price class in the Minneapolis locality is less than District Average.
>
> As provided in the Lincoln Sales Agreement, we would discuss with you the need for additional Lincoln representation before any action is taken to appoint an additional Lincoln dealer in Minneapolis."

franchise in the Minneapolis area and by denying Quality a Lincoln franchise. Quality's Complaint alleged, *inter alia*, that Ford had no legitimate business reason for denying Quality a Lincoln franchise, and that Prestige had been allowed the right, "in its sole discretion, to determine if the Minneapolis market will be serviced only by its Lincoln dealership." Complaint, paragraph 17; Appendix E, p. A-32.[2] In addition, Quality argued before the District Court and the Court of Appeals that the 1962 letter of agreement served to grant Prestige a *perpetual* veto over the addition of any more Lincoln franchisees in the Minneapolis market area. In its Answer, Ford denied these assertions. Ford argued as well that the 1962 letter of agreement, see footnote 1, *supra*, could in no way be construed as granting Prestige a perpetual veto in the granting of new Lincoln franchises.

Some three months after the action was initiated, Prestige moved for judgment on the pleadings pursuant to Rule 12(c), Federal Rules of Civil Procedure. The District Court, the Honorable Earl R. Larson, granted Prestige's motion. Ford also moved the Court for judgment on the pleadings and its motion was likewise granted. Quality appealed the District Court's orders to the United States Court of Appeals for the Eighth Circuit. On September 27, 1976, the Eighth Circuit reversed the District Court's decision and remanded the case for further proceedings.

As will be observed, the District Court and the Court of Appeals placed quite different constructions upon the allegations contained in Quality's Complaint. The Court of Appeals held that Quality's Complaint, as construed by

[2]All citations to the Appendix herein will be to the appendices of the Petition.

it, stated a claim upon which relief could be granted and remanded the case for further proceedings. It is because the Court of Appeals' decision was premised squarely upon unusual (and, we believe, unwarranted) inferences given to Quality's Complaint that we conclude that this case is inappropriate for consideration by this Court at this time. The appropriate method of determining whether the facts are what the Court of Appeals construed the Complaint to allege is at trial, and not in this Court.

We emphasize that it is only the decision by Ford not to grant an additional Lincoln franchise to Quality which was attacked by Quality, not the nature of Ford's franchises or Ford's general franchising practices. Ford places no territorial restrictions on sales by its franchised dealers, nor does it preclude franchised dealers from dealing in other brands of automobiles. Ford's franchises are, by their terms, nonexclusive in such respects, and Ford reserves the right to add additional franchises in market areas if it should determine to do so on the basis of market analyses. The only assurances generally given franchised dealers are if an additional dealership is to be located within a certain distance of a pre-existing dealership, the need therefor must be demonstrated; they are otherwise not restricted.

The present case is, therefore, an unusual one in that it involves a letter of agreement by which Ford, different from its normal practices, gave minimal additional assurances to induce Prestige to take a Lincoln franchise for Minneapolis, *viz.*, that an additional Lincoln franchise would not be granted save under conditions specified in the letter, which had not occurred at the time of this lawsuit.

We believe it is also important to examine the record

upon which Prestige asks this Court to consider what it asserts is a critical Sherman Act question. The record in this case is not merely incomplete—it is nonexistent. The motions for judgment on the pleadings of Ford and Prestige were made and granted shortly after the action was instituted, and with no substantial discovery. Since the District Court granted Ford and Prestige judgment on the pleadings, the Court of Appeals could not and did not consider or decide factual matters in making its decision.

On motions for judgment on the pleadings, courts are required to accept as true all well-pleaded allegations. Ford denied all of Quality's substantive allegations, but was required to accept them as true in the lower courts, and would be obliged to do so in this Court. Thus, even if we assume that this case may present significant antitrust questions, we submit that it would be truly unfortunate to consider these questions now on a record that is, we believe, inadequate as well as inaccurate. This case is presently only interlocutory in nature, and not "ripe" for review. If the issues which Prestige presents are to be reviewed by this Court, such review should occur only of a decision after thorough exploration and exposition via discovery and trial of all pertinent factual matters. *Cf. White Motor Co. v. United States*, 372 U.S. 253, 295-64 (1963); *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, (1918).

VI.

ARGUMENT

Petitioners suggest that the Court of Appeals' decision is unique and unprecedented, the effect of which is to endanger the right of manufacturers to select their customers by means of locationally exclusive franchise agreements. Ford, as the second largest manufacturer of motor vehicles in this country and one of the nation's largest "franchisers," has a special interest in preserving the integrity of its standard franchise agreements. Therefore, if Ford perceived the Court of Appeals' decision in the same manner as Prestige, we would urge this Court to review it. However, we believe that the Court of Appeals' opinion has no general impact on Ford's or other similar franchise agreements, but rather is applicable only to an unusual and unique set of circumstances.

Petitioners contend that the appellate court decision threatens the integrity of locational franchise agreements, because "[w]hat Quality has pled is purely and simply a vertical exclusive franchise agreement between Ford and Prestige and nothing more."[3] Petition, p. 5. The District Court concluded that Quality had failed to allege a violation of federal antitrust laws because it, too, concluded "that the plaintiff [Quality] had pled only an exclusive franchise agreement. . . ." Appendix A, p. A-8.

The Court of Appeals, however, viewed the Complaint through a different glass. Construing all factual allegations of the Complaint as true and drawing what it viewed as reasonable inferences and intendments from those facts in favor of Quality, *see National Metropolitan Bank v. United States*, 323 U.S. 454 (1945), the Court of Appeals interpreted the Complaint to include sufficient allegations to require that Quality have the opportunity to prove that:

---

[3]As noted above, the franchise is not exclusive except to prevent Ford from placing an additional dealer so-to-say, "across the street' without showing a need to do so. Ford franchises do not limit lines of cars to be sold nor to whom, nor prevent the dealers from selling cars anywhere.

(1) There was no valid business reason for Fords' refusal to grant an additional Lincoln dealership in the Minneapolis area (Appendix C, p. A-20);

(2) A horizontal competitor—Prestige—could, in its sole discretion, determine whether the Minneapolis market area was to be serviced by another Lincoln franchisee, *i.e.*, that a horizontal competitor possessed a total veto over the addition of any new franchise (*Id.*, pp. A-20 to A-21);[4] and

(3) Ford and Prestige were parties to an arrangement whereby a horizontal competitor had been granted *perpetual* veto power over all applications for additional Lincoln franchises in the Minneapolis area. (*Id.*, pp. A-16, A-22 n. 6.)

All of these allegations are denied by Ford. But, because of the issues they present, it is evident that the Eighth Circuit's decision lacks the sweeping implications seen by Prestige because it is specifically predicated upon the foregoing construction of the questions raised by the pleadings.

Indeed, the Court of Appeals' decision acknowledged the legitimacy and legality of the normal exclusive arrangement. The Court conceded that "[i]f Ford's refusal to deal with Quality was merely a unilateral or independent decision" there would be no illegal restraint of trade. *Id.*, p. A-16. Moreover, the Court of Appeals noted that "it is not an unreasonable restraint of trade for a franchisor to exercise his independent judgment as to with whom he chooses to deal." *Id.*, p. A-18. In addition, the Court of

[4]In *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975), the court held that permitting existing franchisees, collectively, to determine whether a new franchisee would be allowed to enter the market constituted a horizontal market allocation in violation of the Sherman Act.

Appeals quoted the language of this Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 376 (1967), where it was stated:

> "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods. [citing United States v. Colgate & Co., 250 U.S. 300 (1919)]."

Therefore, we discern no real inconsistency between the decision in question and those of other courts upholding exclusive agency or franchise agreements in the face of Sherman Act challenges. *E.g., Wilson v. I.B.E. Industries*, 510 F.2d 986, 989 (5th Cir. 1975); *Williams v. Independent News Co.*, 485 F.2d 1099, 1104 (3d Cir. 1973); *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637, 640 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970); *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283, 286 (6th Cir. 1963); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D. C. Cir.), *cert. denied*, 355 U.S. 822 (1957); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899, 903 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957).

Petitioners' counsel have done a thoroughly professional job of emphasizing what they view as the breadth of the Court of Appeals' holding and the impact of that decision on the dockets of the federal courts. However, we do not agree that the present case presents the dangers perceived.

Moreover, because the Court of Appeals' decision does not hold that locationally exclusive franchises are illegal, we are convinced that this case, in its present posture, does not present an important or unresolved federal question in need of consideration by this Court.

Prestige further asserts that the Court of Appeals' decision conflicts with prior decisions by other Courts of Appeals and by this Court. The foregoing discussion, however, indicates that any possible conflict is based on an overly broad construction of the holding by the Court of Appeals. We believe the Eighth Circuit's decision, insofar as it dealt with the validity of locationally exclusive franchise agreements, is altogether consistent with the law in other Circuits and with decisions of this Court. As we have previously suggested, a comparison of the Court of Appeals' discussion of exclusive franchise agreements with decisions by this Court and the other courts of appeals indicates that there is no conflict or inconsistency at all.

The basis for the Court of Appeals' decision to reverse for further proceedings was not its analysis of the legality of exclusive franchise agreements in general nor of locational franchises in particular; instead, the thesis was, we believe, a rather strained construction of Quality's Complaint. It seems clear from the Court's opinion that if, as we believe it will, the evidence displays a valid business reason for denying Quality a Lincoln franchise or that Prestige does not in fact have the power to veto an additional franchise at its sole discretion, or that the agreement between Ford and Prestige is not perpetual, then a Sherman Act violation will not have been established.

We cannot convince ourselves that the Court of Appeals committed such an error of law as to warrant review on

the present record. The only real question is whether the pleadings made a case for further proceedings before the District Court. While the Court of Appeals' decision that they did is not one which Ford views as correct, that decision does not, in our judgment, present "*cert*-worthy questions."

VII.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of January, 1977, three copies of this Brief in Opposition were mailed, postage prepaid to Harold D. Field, Jr., attorney for Petitioners Prestige Lincoln-Mercury, Inc., N. Grossman and H. I. Grossman, and to Charles A. Cox, counsel for Respondent Quality Mercury, Inc. I further certify that all parties required to be served have been served.

Henry Halladay, Counsel for Respondents Ford Motor Company and Ford Marketing Corporation

Supreme Court, U. S.
FILED
JAN 26 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-871

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT QUALITY MERCURY, INC., IN OPPOSITION

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IN THE

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OCTOBER TERM, 1976

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PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF AND SUPPLEMENTAL APPENDIX OF RESPONDENT QUALITY MERCURY, INC., IN OPPOSITION

Respondent, Quality Mercury, Inc., plaintiff in the District Court and appellant below, prays that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above matter on September 27, 1976.

I.

OPINIONS BELOW

In addition to the reports of the decision cited in the petition at page 2, the decision of the Court of Appeals is reported at 542 F. 2d 466 (1976).

II.

QUESTION PRESENTED

This case is not an assault on exclusive franchises. It does not take issue with the concept of exclusive franchises. Contrary to petitioners' claim, it certainly does not involve the typical exclusive franchise imposed by a manufacturer. In short, the case does not involve the question set forth in the petition.

This is the real question: Where a plaintiff alleges that

> (1) an exclusive dealer and a manufacturer acknowledge the need for a second franchise in the exclusive dealer's market area; and
>
> (2) the manufacturer would award a second franchise to plaintiff but for a 1962 letter which has been held out to plaintiff as giving the exclusive dealer the perpetual right to veto the needed franchise,

is the arrangement legal *per se*, or does the complaint state a claim upon which relief can be granted if the allegations are proved?

III.

STATEMENT OF THE CASE

A. The Nature of the Case and Its Disposition Below

Respondent, Quality Mercury, Inc., hereinafter referred to as Quality, adopts the statement of the nature of the case and its disposition below as set forth in the petition. Petitioners hereinafter will be referred to collectively as Prestige, and respondents Ford Motor Company and Ford

Marketing Corporation hereinafter will be referred to collectively as Ford.

B. The Facts

The statement of facts by Prestige requires enlargement. Ford Motor Company, one of the "big three" American automobile manufacturers, markets its vehicles through various divisions of Ford Marketing Corporation. One of these divisions, the Lincoln-Mercury division, markets both the Lincoln, a high-priced luxury car, and the Mercury, a line of automobiles which includes cars of various types and prices.[1]

Ford's established policy is to franchise a single dealer to sell both Lincolns and Mercurys. The two lines complement each other, together offering virtually every type and price level of automobiles manufactured and marketed by United States automakers.[2] The dual franchisee generally benefits from a larger volume with the resulting economies of operation allowing it to serve the public better.[3]

Quality, located in Bloomington, Minnesota, has been a franchised Mercury dealer since January 2, 1968.[4] The Grossmans effectively and directly control Prestige, which is franchised to sell both Lincolns and Mercurys. Prestige is located in St. Louis Park, Minnesota.[5] Since commencing business in 1962, Prestige has been the sole Lincoln dealer in the Minneapolis market.[6] The Minneapolis market includes Bloomington and St. Louis Park which are large suburbs of Minneapolis.

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[1]Complaint, Paragraphs 9, 10, Appendix E at A. 29.
[2]*Id.*, Paragraph 11, Appendix E at A. 29-30.
[3]*Id.*
[4]*Id.*, Paragraph 12, Appendix E at A. 30.
[5]*Id.*, Paragraphs 13-14, Appendix E at A. 30-31.
[6]*Id.*, Paragraphs 13, 17, Appendix E at A. 30-32.

Both Ford and Prestige acknowledge that the Minneapolis market needs a second Lincoln franchise.[7] Ford policy is to appoint additional Lincoln or Mercury dealers at its discretion if the newly appointed dealer is to be located 10 miles or more from any existing dealer selling the automobile to be sold by the new franchise.[8] Quality is located more than 10 miles from Prestige and while the primary market areas of Quality and Prestige border on each other, they encompass substantially different areas.[9]

Despite all this, Quality's repeated applications for a Lincoln franchise have been denied. It remains one of a handful of the approximately 1100 supervised dealers in the Lincoln-Mercury division which is not franchised to sell both Lincolns and Mercurys.[10] The sole reason given for this departure from Ford's established franchising policies, a departure which persists even in the face of an acknowledged need for a second franchise, is that a 1962 letter from Ford to the Grossmans requires Ford to maintain Prestige as the one and only Lincoln dealer in the entire Minneapolis market.[11]

Whatever the letter actually says, it has been held out to Quality[12] and treated by Ford and Prestige[13] as giving Prestige the *perpetual* right to veto additional Lincoln representation in the Minneapolis market irrespective of market needs and conditions and despite Prestige's own inability to serve the market adequately.[14] Under these

[7] *Id.*, Paragraph 17(a), Appendix E at A. 32.
[8] *Id.*, Paragraph 17(c), Appendix E at A. 32-33.
[9] *Id.*, Paragraphs 12-13, Appendix E at A. 30-31.
[10] *Id.*, Paragraphs 11-12, Appendix E at A. 29-30.
[11] *Id.*, Paragraphs 16, 17, Appendix E at A. 31-33.
[12] *Id.*, Paragraph 17(c), Appendix E at A-32-33.
[13] *Id.*

[14] *Id.*, Paragraphs 17(a)-(d), Appendix E at A. 32-33.

Petitioners have made much of the absence of the word "perpetual" from the complaint. *Petition*, n. 21 at p. 18. The Court of Appeals was required to construe all well-pleaded factual allegations as true and draw in favor of Quality all reasonable inferences from those facts. *See Collins v. Handyman*, 341 U.S. 651 (1952); *National Metropolitan Bank v. United States*, 323 U.S. 454 (1945). The Court of Appeals examined the character and nature of the exclusive pleaded by Quality and held that "a fair construction of Quality's pleadings is that Ford and Prestige violated the Sherman Act by agreeing to an exclusive franchise in *perpetuity*" (emphasis supplied by the court). Appendix C at A. 22.

In neither the Court of Appeals nor in this Court has Prestige been content merely to argue whether or not its exclusive reasonably may be inferred to be perpetual. Instead it has characterized Quality's argument of perpetuity as "disingenuous" and has asserted that Quality's counsel would have violated Rule 11 of the Federal Rules of Civil Procedure had they included the word "perpetual" in the complaint. *Petition*, n. 21 at p. 18. To support its accusations, Prestige has gone outside the pleadings and referred to a deposition and quoted selectively from the 1962 letter. On the basis of its accusations and the material outside the pleadings, Prestige would have this Court conclude, despite Quality's allegations to the contrary, that "the exclusive was guaranteed to Prestige for only two years and its continued existence thereafter was specifically tied to market conditions." *Id.*

Having opened the door to consideration of material outside the pleadings, Prestige cannot now object to the presentation of additional material by Quality. Appendix I and Appendix II *infra* contain two documents produced by Ford in response to Quality's request for production of documents. These documents explode Prestige's claim that its exclusive is of limited duration or tied to market conditions, or both. However, the documents are included herein not to prove that Quality's complaint states a claim, but to defend against Prestige's spurious allegation that Quality and its counsel have acted in bad faith.

Petitioner N. "Bud" Grossman certainly regards the exclusive as perpetual. He claims "he was advised not to concern himself about the appointment of an additional Lincoln dealer in the market," Appendix I, *infra* at A-2, because Ford "committed to him the exclusivity of the Lincoln franchise in Minneapolis for as long as he was a dealer." Appendix II, *infra* at A-6. Not only does he regard his exclusive franchise as perpetual, he regards the language in the letter pertaining to market conditions as "meaningless," apparently on the advice of Leonard, Street and Deinard, his attorneys on this appeal. Appendix

circumstances, the sole purpose and effect of this veto power is to insulate Prestige unnecessarily from intrabrand competition.[15]

Ford and Prestige's interference with the "unrestrained interaction of competitive forces"[16] has directly injured Quality and is prejudicial to the public interest. Quality has suffered substantial injury to its business, goodwill and property by being deprived of the profits it would have realized from sales, leases, service and other business it would have had if it were a franchised Lincoln dealer.[17] By denying the public a needed Lincoln outlet for sales, leasing and service, Prestige and Ford have also deprived the public of the benefits of competition in the large and significant Minneapolis market[18] which Prestige neither can nor does service adequately.[19]

The foregoing facts are in the complaint. They are the facts for purposes of deciding the real question before this Court which is whether the Prestige exclusive is legal *per se* or whether, instead, Quality is entitled to prove at trial that the maintenance of the Prestige exclusive under these circumstances violates Section 1 of the Sherman Act, 15 U.S.C. §1.

II, infra at A-7. Despite having failed to meet the market penetration standard set forth in the letter, Appendix I, *infra*, at A-1, Grossman interpreted the letter to mean "Lincoln exclusivity in Minneapolis regardless." Appendix II, *infra* at A-7.

Quality's claim that the exclusive is perpetual is hardly "disingenuous." Nor did the Court of Appeals "go too far" in construing the complaint. *Petition*, n. 21 at p. 18. Instead it is Prestige and its counsel who have gone too far, much too far, and have advanced arguments in this Court which are not only inconsistent with Grossman's unequivocal claim of perpetual exclusivity, but which are also contrary to the documentary evidence in the possession of Prestige and its counsel.

[15]Complaint, Paragraph 17(d), Appendix E at A. 33.
[16]Appendix C at A. 16.
[17]Complaint, Paragraph 18, Appendix E at A-33.
[18]*Id.*, Paragraph 19, Appendix E at A. 33-34.
[19]*Id.*, Paragraph 17(d), Appendix E at A. 33.

IV.

ARGUMENT

THE COURT OF APPEALS HELD THAT THE MAINTENANCE OF THIS PERPETUAL DEALER-IMPOSED EXCLUSIVE IN THE ABSENCE OF ANY LEGITIMATE BUSINESS JUSTIFICATION AND DESPITE THE ACKNOWLEDGED NEED FOR A SECOND DEALER IS PRIMA FACIE SUSPECT. ITS DECISION IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS AND DECISIONS OF THIS COURT. IT IS ALSO CONSISTENT WITH THIS COURT'S ADMONITIONS THAT MOTIONS FOR JUDGMENT ON THE PLEADINGS ARE TO BE GRANTED SPARINGLY.

INTRODUCTION

Quality's complaint does not attack the typical exclusive franchise, awarded or even imposed by the manufacturers. It does not seek to overturn the numerous precedents sustaining their validity. Quality challenges only the perpetual maintenance of a dealer-imposed exclusive where those who maintain it acknowledge that another dealer is necessary. By all tests of reason, these circumstances amount to an unreasonable restraint *per se*. Quality has asked only that it be allowed to prove its case.

Many exclusives serve legitimate ends. In the typical situation the manufacturer unilaterally grants an exclusive because in the exercise of its business judgment it has determined that an exclusive best serves its own interests. *See, e.g., Joseph E. Seagram & Sons, Inc., v. Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970); *Cartrade, Inc., v. Ford Dealers Advertising Association*, 446 F. 2d 289 (9th Cir.

1971), *cert. denied* 405 U.S. 997 (1972). A dealer's request for an exclusive does not render the arrangement unreasonable *per se*, but its legality depends upon the existence of a legitimate business purpose. *E. A. Weinel Construction Co. v. Mueller Co.*, 289 F. Supp. 293 (E.D. Ill. 1968).

Prestige's contention that Quality has pleaded a simple and typical vertical exclusive agreement between Ford and Prestige "and nothing more," *Petition* at p. 5, ignores Quality's allegations of much more. The endless maintenance of an exclusive at the sole discretion of the exclusive dealer in a territory admittedly in need of a second dealer is not simple, it is not typical and it is not legal. The emphasis by Prestige on *Cartrade, supra, Weinel, supra,* and other cases holding that an exclusive is legal so long as it does not unreasonably restrain trade[20] is misdirected. Quality does not dispute the validity of such precedents. It emphatically disputes their applicability.

The Court of Appeals agreed with Quality. While explicitly recognizing the legitimacy of the normal exclusive, Appendix C at A16, 18, the Court distinguished the Prestige exclusive.

Ford did not unilaterally deny Quality's franchise application. The denial was joint or collaborative in that Ford allowed Prestige in its sole discretion to veto the application.

There were no valid business reasons for the denial. No legitimate business consideration can justify Prestige's

[20] *Bushie v. Stenocord Corp.*, 460 F. 2d 116 (9th Cir. 1972), quoted in *Petition* at pp. 11-12; *Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F. 2d 637 (10th Cir. 1973), *cert. denied* 411 U.S. 987 (1973), quoted in *Petition* at p. 12; *Ace Beer Distributors, Inc., v. Kohn, Inc.*, 318 F. 2d 283 (6th Cir. 1963), quoted in *Petition* at p. 13.

perpetual veto power over competition, even where additional Lincoln representation is necessary.

This rare, if not singular, situation is, as the Court of Appeals concluded, *prima facie* suspect.[21]

A. The Denial of Quality's Application Was Joint or Collaborative

Prestige in its sole discretion determines if the Minneapolis market will have a second franchise. Pursuant to the 1962 letter, Prestige has exercised its veto to maintain its exclusive. This supercedes Ford's franchising policies. It thwarts Ford's interest in establishing a Lincoln franchise in an area determined to need one. To treat this exclusive as having been imposed unilaterally by the manufacturer is to ignore Quality's complaint and the 1962 letter itself. The denial of Quality's application was clearly the result of joint or collaborative action by Ford and Prestige. In fact, Prestige now admits that "under its *agreement* with Ford [Prestige] had sole discretion to determine whether a horizontal competitor could enter the Minneapolis market" (emphasis added). *Petition* at 17.

[21] Appendix C at A. 21-22. *See also* Turner, *The Definition of Agreement under The Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 704 (1962).

Because the Court of Appeals distinguished the Prestige exclusive from the normal exclusive franchise, there is no conflict between this case and *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 537 F. 2d 980 (9th Cir. 1976), *cert. granted* 45 Law Week 3299 (1976). *See Petition* at 10-11. In fact, the Court of Appeals cited many of the cases relied upon by the *Sylvania* court for the proposition that exclusives normally are valid. Quality alleged and the Court of Appeals found, however, that the Prestige exclusive was atypical. Even if the questions of the location clause and the exclusive dealing arrangement are "inextricably bound together", *Petition* at 11, this is not the case to review in connection with *Sylvania*, since the Prestige exclusive is quite different from those the *Sylvania* court asserted were legal.

Ford would grant Quality's application if Prestige would withdraw its objection.[22] However, the Prestige exclusive continues to exist because Ford has become the instrumentality, the tool, of one of its select franchises for purposes of horizontal territorial allocation. *United States v. Sealy*, 338 U.S. 350 (1967). Ford has allowed Prestige, "concerned [solely] with [Prestige's] own position", to dictate exclusivity. *United States v. Chicago Tribune-New York News Syndicate, Inc.*, 309 F. Supp. 1301 (S.D.N.Y. 1970). This joint or collaborative conduct of Ford and Prestige is similar to that condemned in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), and *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 365 F. Supp. 1073 (D.N.J. 1973), *affd. in part*, 521 F. 2d 1230 (3d Cir. 1975).

In *Topco, supra*, 25 small grocery store chains formed a cooperative association to serve as purchasing agent for Topco-brand products. Applicants for membership required the approval of both 75 percent of the membership and the board of directors. However, if either the closest existing member or any member within 100 miles voted against membership, the required approval ratio rose to 80 percent. This Court found that territories were allocated to members who did no business in the area on the theory they might wish to expand in that direction at a future date. The voting system was condemned by this Court because the "veto of sorts over actual and potential competition" when coupled with exclusivity worked "effectively to insulate members from competition in Topco-brand goods." *Topco, supra* at 602.

Prestige, like Topco members, has an exclusive in an

[22]Complaint, Paragraph 17, Appendix E at A. 32-33.

oversized market. And it insulates itself from intrabrand competition by a veto. The veto, however, is more than a veto of sorts; it is an absolute veto.

Prestige would limit the holding of *Topco, supra*, to cases where the franchisee owns or otherwise controls the franchisor, or where more than one franchisee participates in the conspiracy. There is no rational reason for such a limitation. It cannot matter if dealer control of the manufacturer arises from partial ownership or from some other factor. And *American Motor Inns, supra*, held that a single franchisee without an ownership interest in the franchisor may conspire with the franchisor to isolate illegally the franchisee from intrabrand competition. *Cf. Chicago Tribune, supra.*

In *American Motor Inns, supra*, plaintiff applied for a Holiday Inns franchise for Newark, New Jersey. The franchise committee, consistent with established policy, sent so-called radius letters to the nearest three Holiday Inns franchisees, one of whom was Fleck, the principal owner of an existing Holiday Inn in Newark. Fleck and another recipient of the radius letters objected to plaintiff's application. Though the franchise committee favored granting the application, Holiday Inns' policy required that the application be forwarded to the executive committee if any recipient of the radius letter objected. The executive committee denied plaintiff's application because of the objections.

Even though the franchisees did not combine to "create and own Holiday Inns, as the Topco franchisees created and owned Topco Associates," the court held that the radius letter policy in general allowed Holiday Inns franchisees to utilize the "parent Holiday Inns as Topco fran-

chisees utilized the 'parent' Topco Associates to allocate territories horizontally so as to restrict intrabrand competition." *American Motor Inns, supra* at 365 F. Supp. 1090.

The District Court, however, did not stop there. It found a separate local conspiracy between Fleck and the parent Holiday Inns:

> Regardless of whether the radius letter policy in *general* constitutes a conspiracy to allocate territories horizontally, as I have held above, the facts surrounding the Elizabeth application by AMI, the dealing by Holiday Inns with Fleck, and the ultimate denial of a franchise to AMI, constitute a *local* conspiracy to allocate territories horizontally so as to prevent any competition between Fleck and any new Holiday Inns franchisee (emphasis supplied by the Court). *Id.* at 1091.

The dealing between Holiday Inns and Fleck included determinations by both Holiday Inns and Fleck that the Newport airport area was favorable for motel expansion, a representation by Holiday Inns that Fleck would be awarded a franchise in the airport area, and the subsequent denial of plaintiff's application for a franchise in the identical area after objection by Fleck. Like Ford, Holiday Inns treated its franchisee's objection to a needed franchise as dispositive. In fact Holiday Inns told plaintiff to "make a deal" with Fleck and Holiday Inns would abide the result. *Id.*

Because the issue of a general conspiracy on a national level was not fairly litigated in the District Court, the Third Circuit reversed the holding on the general effect of the radius letter policy. *American Motor Inns, supra* at 521 F. 2d 1244. However, it unequivocally affirmed the holding that a local conspiracy existed. In so doing, the Third Circuit distinguished the Newark situation from the typical vertical restraints present in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967), and in the other cases upon which Prestige relies. The court declared at 521 F. 2d 1243:

> Concededly, HI, in the case at hand, was not created, nor is it in general controlled, by its licensees, as Topco was. Further, there are no rigidly defined territories—as in Topco—within which HI's Newark-area franchisees have the exclusive right to operate. However, according to the finder of fact here, HI treated the franchisees' objections to AMI's application as dispositive and thus allowed its licensees, like the existing Topco members, to determine whether the applicant would be allowed to compete with them. Although there are no explicit limits on the area over which the Fleck and Carteret franchises exercise veto power, the radius letters from HI, together with the significance accorded to the franchisees' objections, function like the combination of the exclusivity provisions and the veto power over new members of *Topco* "effectively to insulate members from competition" under the Holiday Inn Trademark.
>
> HI's action in denying AMI's application, according to the trial court, was not taken unilaterally, but rather *in concert with one or more* of its licensees. If HI had acted independently in refusing AMI's request, such conduct might have been akin to the vertical restraints in *Schwinn*. But where, as here, the action in question is ascertained by the finder of fact to be joint or collaborative, it is sufficient to constitute a "combination or conspiracy" within the meaning of the Sherman Act (emphasis added, footnotes and citations omitted).

There is no reason to review the holding that the denial of Quality's application was joint or collaborative. Prestige has admitted that it has sole power to determine whether it will have horizontal competition in the Minneapolis market, Petition at 17, and Ford has treated its exclusive franchisee's veto of a needed franchise as dispositive. *Topco, supra,* and *American Motor Inns, supra,* control the case pleaded by Quality. The decision of the Court of Appeals was wholly consistent with both cases.

B. The Veto Power Does not Exist to Protect Any Legitimate Business Interest of Either Ford or Prestige. It Exists Only to Further the Illicit Ambitions of Prestige.

Prestige apparently believes that exclusive territorial franchises are legal regardless of the circumstances. This is not the law. The law is that "an exclusive dealership is valid under the antitrust laws even though it restrains trade, provided the restraint is not unreasonable." *Chicago Tribune, supra* at 1307. Whether the Prestige exclusive is reasonable can be determined only after an examination of the facts peculiar to the automobile industry in general as well as those facts peculiar to this manufacturer, this dealer and this market. The endless maintenance of an exclusive where a second dealer is necessary and where the existing dealer calls the shots compels such an examination. *Chicago Board of Trade v. U.S.*, 246 U.S. 231 (1918). Once the particular facts of the case have been developed the rule of reason enunciated in *Chicago Board of Trade, supra,* must be applied to determine the reasonableness of the restraint:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. *Id.* at 238.

Prestige's argument that its exclusive is legal regardless of term, regardless of any changes in the market and despite the presence or absence of any other business justification would repeal the rule of reason. To support its overreaching proposition, Prestige cites *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F. 2d 418 (D.C. Cir. 1957), *cert. denied* 355 U.S. 822, *rehearing denied* 355 U.S. 900 (1957), *rehearing denied* 357 U.S. 923 (1958), and *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md. 1956), *affd.* 239 F. 2d 176 (4th Cir. 1956). To apply *Packard* and *Schwing* to this case is either to ignore Quality's complaint to conclude that the facts justifying those exclusives are present in this case, or to interpret *Packard* and *Schwing* as establishing a rule of *per se* legality for dealer-imposed exclusivity in

the automobile industry. Either position is untenable. The *Packard* and *Schwing* doctrines are of limited scope and have no application to the particular facts of this case.[23]

The major justification for the *Packard* and *Schwing* exclusives was the relatively insignificant market shares commanded by the now defunct automakers. *Packard, supra* at 243 F. 2d 421; *Schwing, supra* at 138 F. Supp. 905-06. In *Schwing*, for example, the court strongly intimated that its decision would have been different had the manufacturer held a stronger position in its market. *Schwing, supra* at 138 F. Supp. 906. Mr. Justice Brennan's analysis of *Packard* and *Schwing* also reflects this view:

> In [Packard] the court observed, in holding an exclusive franchise arrangement not violative of the Sherman Act:
>
> 'The short of it is that a relatively small manufacturer, competing with large manufacturers, thought it advantageous to retain its largest dealer in Baltimore, and could not do so without agreeing to drop its other Baltimore dealers. To penalize the small manufacturer for competing in this way not only fails to promote the policy of the antitrust laws but defeats it.'
>
> The doctrine of the *Packard* and *Schwing* cases is, however, of necessarily limited scope; not only were the manufacturers involved much smaller than the "big three" of the automobile industry against whom they competed, but both had experienced declines in their respective market shares. In short, both the manufacturers and the dealers in *Schwing* and *Packard* needed the exclusives in order to enhance their positions in competition with the large automakers. *White Motor Co. v. U.S.*, 372 U.S. 253, n. 8 at 269-270 (1963).

[23]In *American Motor Inns, supra*, the Third Circuit questioned whether *Packard* is still good law in the wake of *Topco, supra. See* 521 F. 2d, n. 38 at 1244.

Contrary to the manufacturers and dealers in *Packard* and *Schwing*, neither Ford nor Prestige needs the exclusive to enhance its competitive position. Ford is the nation's second largest automaker. It is hardly on the verge of extinction as the manufacturers in *Packard* and *Schwing* were at the time of those decisions.

Where, as here, the restraint imposed by the exclusive is clearly excessive for the manufacturer's needs, it is appropriate to determine whether the dealer has some legitimate business need which warrants the protection. *Note, Restricted Channels of Distribution under the Sherman Act*, 75 *Harv. L. Rev.* 795, 826 (1962). An examination of the peculiar aspects of the Prestige exclusive can lead only to the conclusion that it is also excessive for any of Prestige's legitimate needs and exists only to further the illicit ambitions of Prestige.

The size of this exclusive is unreasonable. Ford usually finds a ten-mile area sufficient for the protection of its franchisees.[24] Yet Prestige has laid claim to a far larger territory than usual and, like that in *Topco*, far larger than it can and does service adequately. *Topco, supra* at 602. Changing market conditions dictate the need for a second dealer in the Minneapolis market. Prestige's veto of Quality's application parallels Fleck's veto of a needed franchise in an area found favorable for expansion. *American Motor Inns, supra* at 365 F. Supp. 1090.

[24]Complaint, Paragraph 17(c), Appendix E at A. 32-33.

The suspect exclusive is not only located in an oversized market; it is also located in an area over which Prestige exercises perpetual control. As the Court of Appeals noted, "a perpetual exclusive franchise is suspect under the Sherman Act because changes in conditions, unforeseen when the exclusive was granted, may combine to create an anti-competitive effect." Appendix C at A22. *Cf. Chicago Board of Trade, supra* at 238. The term of the agreement is always a "useful yardstick" in measuring its reasonableness, *Note, Restricted Channels, supra* at 826, and the justification for any exclusive "runs out after a reasonable period." *Turner, supra* at 705. If exclusives of one or two years have generally been found adequate, even in the automobile industry where the required initial investment is relatively high, *Note, Restricted Channels, supra* at 827, Ford and Prestige hardly can demonstrate the need for a perpetual exclusive in an oversized market.[25]

Despite the fact that exclusive contracts by definition restrain trade, they have been sustained where they are used as a means to enhance competition generally. *See, e.g., Packard, supra.* But while exclusives are often sustained, there is nothing magical about them. They cannot unreasonably restrain trade any more than can other contracts. Where an exclusive exists in the face of unquestioned need for more market representation, that is to define illegal restraint of trade by example. Minneapolis and its suburbs were a very different world in 1962. Yet the Prestige exclusive has grown to a petpetuity to be maintained at the sole discretion of Prestige and even in the face of inadequate market performance by Prestige. The

[25]It is interesting to note that the absolute right of Prestige to an exclusive presumably was to last only two years.

case is a classic example of how a contract possibly benign enough in the beginning can become a malignancy requiring judicial surgery.

The Court of Appeals' conclusion that the Prestige exclusive is suspect need not be reviewed. The Court of Appeals did not ignore *Schwing* and *Packard.* It distinguished those cases and instead followed *Topco* and *American Motor Inns* in holding that perpetual exclusivity in an oversized market, coupled with the absence of any legitimate business justification for such protection works effectively to insulate Prestige unnecessarily from any intrabrand competition.

C. The Decision of the Court of Appeals Is Consistent With This Court's Admonitions Against the Over-Zealous Use of the Disfavored Judgment on the Pleadings

To utilize the Draconian judgment on the pleadings to dismiss a complaint is to conclude that it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hospital Building Co. v. Trustees of Rex Hospital,* 965 S.Ct. 1848, (1976); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Because Quality is entitled to the benefit of its well-pleaded allegations and all reasonable inferences arising therefrom, dismissal of its complaint is akin to holding that there are no limits on manufacturer-dealer agreements which restrict the entry of competition for the dealer. Such a holding would be directly contrary to *Topco, supra,* and *American Motor Inns, supra.* It also would disregard the rationale of the numerous cases holding that exclusives are legal only *if* they do not unreasonably restrain trade.

Prestige's "floodgates" argument assumes that its franchise is typical. It is anything but, and litigation arising from this peculiar, and presumably rare, but pernicious type of arrangement inevitably will be isolated. The fact is that none of the franchisees in cases where exclusives have been sustained, and in all probability few, if any, of the other franchisees existing in the United States today have been able to extract from the franchisor the perpetual right to veto horizontal competition in an oversized market which both the franchisee and the franchisor admit needs additional representation. This repugnant arrangement is typical of those which have been condemned because of overreaching on the part of the dealer. *Topco, supra; American Motor Inns, supra; Chicago Tribune, supra.*

The reasonableness of a restraint is itself a question of fact, *Thomason v. Hospital T. V. Rentals, Inc.*, 272 F. 2d 263 (8th Cir. 1959), and necessarily involves the determination of numerous other underlying fact questions. *Chicago Board of Trade, supra.* Because of the implicit *per se* determination of the legality or illegality of the particular restraint when antitrust cases are dismissed summarily, such dispositions are disfavored. *Hospital Building Co., supra* (judgment on the pleadings dismissing antitrust complaint reversed); *White Motor, supra* (summary judgment in favor of government in antitrust action reversed).

Ford has gone much further than unilaterally awarding an exclusive franchise. It has allowed Prestige to extract a perpetual veto which can be exercised even over needed competition. Such an arrangement demands justification. *Note, Restricted Channels, supra* at 824. *See also,* Appendix C, n. 6 at A22-23. It cannot be declared *per se* legal

on the pleadings because no case, even after a full trial, has upheld such an exclusive. In ordering Ford and Prestige to justify their suspicious agreement, the Court of Appeals merely obeyed this Court's repeated admonitions against the overzealous use of summary dismissals. There is nothing to review.

CONCLUSION

Prestige's perpetual veto over horizontal competition, even if competition is needed, is so unique that it is hard to imagine a similar case. There will be no torrent of litigation as a result of the Court of Appeals' decision that this suspect arrangement should be put to the test of discovery and a trial. In ordering further proceedings the Court of Appeals followed antitrust law as developed by *Topco* and *American Motor Inns,* and heeded this Court's warnings that antitrust complaints should be dismissed only in the most extreme circumstances.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 24, 1977

APPENDIX I

EXHIBIT III

Ford Marketing Corporation — Twin Cities District
Inter Office Communication — Lincoln-Mercury Division
October 25, 1971

MEMO TO FILE

Subject: Prestige Lincoln-Mercury
Minneapolis, Minnesota

Re: Lincoln Penetration Performance

Accompanied by Mr. W. A. Litle, Midwestern Regional Sales Manager, contacted Mr. Norman "Bud" Grossman regarding the fact that his Lincoln penetration on a year-to-date basis had been below District Average for a consistent period of twenty months. In view of his failure to attain District Average penetration during this period, we advised Mr. Grossman he had not fulfilled the condition of the Divisional letter of April 11, 1962, which stated . . . "We would not propose any additional Lincoln representation in Minneapolis for at least two years from the date of the letter, and then only if Lincoln penetration of Price Class in the Minneapolis locality was less than District Average".

We presented Mr. Grossman the attached letter (which letter covers a period of eighteen months performance) detailing his below District Average penetration, and, in summary, stated that the Division believed it has cause to provide additional Lincoln representation in Minneapolis because of Prestige's inability to provide adequate penetra-

tion for one and one-half years. Mr. Grossman became quite perturbed when confronted with this information stating that the Division had a moral obligation to continue the existing Lincoln franchise arrangement in the Minneapolis market. Mr. Grossman claimed that in 1962 when he became the Lincoln-Mercury dealer, Divisional representatives had contacted him repeatedly to take on the franchise and he claims he was advised not to concern himself about the appointment of an additional Lincoln dealer in the market. Mr. Grossman further remarked that the former Lincoln-Mercury dealership, Mitchell-Boyer, Inc., had been a losing proposition and he himself had lost money for several years before Prestige Lincoln-Mercury became a profitable venture.

Mr. Grossman then pointed out that at no time was he advised by a Company representative that his performance was below District Average and if he did not attain District Average within a specified period of time, the Devision intended to appoint additional representation. He admitted that we had advised members of Prestige Lincoln-Mercury management on a number of occasions that his performance was below District Average, but never had we stated that if the performance did not improve and attain District Average within a specified time that we would proceed to appoint additional Lincoln dealers. Mr. Grossman felt very strong that this should have been done as a matter of good business practice and as a courtesy to Prestige Lincoln-Mercury. Mr. Grossman further remarked that his attorneys were fully cognizant of the contents of the Division letter and the letter did not state any specific period of time that below District Average performance

would occasion the appointment of additional Lincoln representation.

Mr. Grossman also made the point that he failed to understand the Division and Company position on Lincoln franchising if his purchases of Ford Motor Company products by the Gelco Corporation were considered. He stated that seven years ago Gelco had not purchased a Ford Motor Company product in their leasing company, and this year they would purchase between seven and eight thousand units for lease—second only to purchases by the Hertz Corporation. He did not feel that the Division had carefully considered the value of these purchases versus additional sales by Prestige of one hundred or two hundred more Lincolns during this period.

After some considerable discussion, Mr. Grossman's first request with respect to this situation was that the Company and the Division drop the entire matter of additional Lincoln franchising in Minneapolis. As an alternative, he then stated he was aware that there were additional markets in the country whose situation was similar in that they only had one Lincoln dealer. He said "When you get these markets straightened out, then advise me that Minneapolis is the only existing market with a single Lincoln dealer, but don't start here first."

Mr. Grossman then stated that if the Division felt that a letter was necessary, he should be given a period of time in which to achieve District Average penetration, or some other acceptable standard, and requested that the time period be the 1972 model year. At this point, Mr. Grossman requested we take back the attached letter until such time as we came to a decision as to the course we would pursue. He said he had no desire to take on the Ford Motor

Company in a legal action, but if we intended to enforce the attached letter, he would immediately seek a court injunction to prevent us from franchising additional Lincoln dealers and, win—lose—or draw, would initiate legal action through the courts to prevent us from franchising additional Lincoln dealers.

We advised Mr. Grossman that we would have further discussions with management and contact him in the near future with regard to our decision.

/s/ G. H. HEGNER
District Sales Manager

APPENDIX II

MEMORANDUM TO FILE

January 7, 1972

Reference: Prestige Lincoln-Mercury
Minneapolis, Minnesota

A conference was held on Thursday, January 6, 1972, at the Twin Cities District Sales Office with the following people in attendance:

Mr. A. L. Whiteman, General Sales Manager, L-M Div.
Mr. W. A. Litle, Regional Sales Manager, Midwest Region
Mr. G. H. Hegner, District Sales Manager, Twin Cities
Mr. Bud Grossman, Dealer Principal
Mr. Harold Grossman, Dealer Principal
Mr. Tom Grossman, Dealer Principal

Prior to the conference, I visited the Grossmans at the Prestige Lincoln Mercury dealership, toured the facilities, and became acquainted with Mr. Elliott, their new General Manager.

In opening the discussion at the conference, I advised the Grossmans that my purpose in coming to Minneapolis was not to settle the issue of the exclusivity of their Lincoln franchise in Minneapolis, but rather to provide me an opportunity to get acquainted with them and their operation and to merely discuss with them their feelings regarding the matter.

I asked Mr. Bud Grossman to review for me the entire background of the matter and give me his feelings on it. This review took several minutes and generally followed the pattern as outlined in our files except that he

told me that when he took the Lincoln-Mercury deal, the Division was so hard up for representation and so anxious to have him as a dealer that they committed to him the exclusivity of the Lincoln franchise in Minneapolis for as long as he was a dealer. Bud Grossman further stated that he was aware at the time—and told the Lincoln-Mercury principals—that sometime, the Lincoln franchise would be very valuable and that the Division would want more than one dealer in Minneapolis and for them not to forget that his taking the deal was conditioned on their commitment for exclusivity for as long as he was a dealer. (He reiterated this point several times.)

He pointed out that when he first took the deal in a downtown location, he lost many, many thousands of dollars; but had, through time and the assistance of the Lincoln-Mercury Division people, built the dealership up to where it was now—a successful operation, providing total Lincoln-Mercury penetration that was considered satisfactory and one which he—and he felt sure the Lincoln-Mercury Division—was proud of.

He went on to say that on several occasions, the matter of appointing additional Lincoln dealers in the market has been discussed with him. On one instance, he said, he had "thrown out of his dealership" Pat Brescia and Bill Moriarity—who was there to "advise that the Division was breaking their word on this matter." He indicated that on one occasion—during the time his mother was dying, which was a difficult period for him—he had to come to Detroit on this matter, at which time he had spoken to Paul Lorenz as well as Matt McLaughlin and that he understood that as a result of those conversations, the matter was put to bed.

At this point he said that he considered himself the Ford Motor Company's second biggest customer—buying up to 10,000 Ford Motor Company vehicles this year through GELCO; and that in his mind, it was absolutely unbelievable that good businessmen would upset this kind of a customer and good dealer over a matter which, in his opinion, had been "put to bed" several times.

I listened to his entire story without interruption and made sure that no one in the group became emotional over the issue. I told him it wasn't clear in my mind what he meant about a remark he had made earlier to Mr. Hegner . . . something to the effect that "why are you picking on me when you have other good-sized markets where you only have one Lincoln dealer—go get them fixed first, then come see me." Mr. Grossman stated that what he meant by that was, it seemed inappropriate to him that we would be talking to him in terms of a company policy when there were several exceptions to it already that had not been concluded. He went on to say that the remark was a casual one—of no significance.

I assured him it was not our intention to single him out in any way.

I told Mr. Grossman that his understanding regarding a commitment by the Division to Lincoln exclusivity as long as he was a dealer did not seem compatible to me with the letter that had been given him. He stated that the wording in the letter regarding district average was meaningless, and that his attorney had so advised him. His interpretation of the letter was that . . . as had been stated . . . "Lincoln exclusivity in Minneapolis regardless." I advised him frankly that it wasn't what the letter said. He said that his attorney had advised him that the letter content regard-

ing district average was not applicable today because of shortgages of Lincolns and Marks from time to time; the shift in the luxury segment of the market since the letter; as well as the fact that the district average was meaningless in such a small market.

The conference was closed on a congenial note with me telling Mr. Grossman that as I indicated earlier, no conclusions were being drawn at this time. He stated he wanted to get this matter settled once and for all—he was tired of it being a matter of discussion between us. He further stated that if we chose to interpret the letter on a basis which resulted in our establishing a specific timetable for him and advising that failure to accomplish district average based on this timetable, he would be forced to begin litigation proceedings immediately. I told Mr. Grossman in closing that I would discuss the matter with other members of Division management and determine what course of action would be taken, if any. I further encouraged him to continue to provide good representation on all car lines in the marketplace. Mr. Grossman assured me that this would be done.

/s/ A. L. WHITEMAN
General Sales Manager

Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-871

PRESTIGE LINCOLN-MERCURY, INC., N. GROSSMAN and H. I. GROSSMAN,

Petitioners,

vs.

QUALITY MERCURY, INC., FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Respondents.

PETITIONERS' REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF

I.

IMPACT OF COURT OF APPEALS' DECISION

In an apparent effort to limit the importance of the Court of Appeals' decision, and thereby reduce the chances that this Court will be interested in reviewing it, Respondents argue that the decision will have no impact on the "normal" exclusive franchise and that Petitioners' claim to the contrary is based on an "overly broad" construction of the decision. (Ford Br. pp. 8, 10; Quality Br. p. 8).[1] This argument is based on the erroneous assump-

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[1]Respondent Quality Mercury, Inc. is referred to throughout this brief as "Quality" and its Brief in Opposition is cited as "Quality Br. p.—." Respondents Ford Motor Company and Ford Marketing Corporation are referred to collectively as "Ford" and their Brief in Oppsition is cited as "Ford Br. p.—."

tion that a "normal" franchise is one granted *unilaterally* by a manufacturer solely in the exercise of his independent judgment. (Ford Br. p. 8; Quality Br. pp. 7, 8). However, contrary to this assumption, the "normal" exclusive franchise agreement comes into being as the result of a *bilateral* agreement, usually sought by the franchisee. (Petition pp. 11-13). It certainly cannot be said that either Packard or Hudson acted unilaterally, when at the request of one established dealer, they each terminated other locally competitive dealers and granted the exclusives validated in *Schwing* and *Packard*.[2] Nowhere in their briefs do respondents suggest that the Court of Appeals' decision is not applicable to such bilateral arrangements. To the contrary, Quality argues (Quality Br. p. 8) and the Court of Appeals decision mandates (Petition, Appendix C, pp. A16-20) that such bilateral agreements are subject to being tested at trial under the rule of reason. The Court of Appeals' decision is, therefore, clearly applicable to the "normal" exclusive franchise.

Respondents also claim that the impact of the Court of Appeals' decision is limited by the "unique" and "unusual" allegations contained in Quality's complaint. These so-called "unique" and "unusual" allegations relate to Petitioners' claimed right to "veto" horizontal competitors in the Minneapolis market and the geographic breadth and

[2]The fact that the terminated dealers in *Packard* and *Schwing* were in existence is evidence that Packard and Hudson believed the Baltimore market "needed" more than one Hudson and Packard dealer. Neither this fact nor the fact that the initiative came from the surviving dealers precluded summary disposition in *Schwing* or the reversal of the judgment for plaintiff in *Packard*. Quality's attempt to limit *Packard* and *Schwing* to failing or weak companies (Quality Br. pp. 16-17) has already been dealt with. (Petition p. 15 n. 20).

duration of the exclusive in the case at bar.[3] (Ford Br. p. 8; Quality Br. pp. 8, 9, 14, 15). However, as pointed out in Part IV of this Brief, there is nothing "unique" or "unusual" about Petitioners' claimed "veto" power. It is, in reality, nothing more or less than the exercise of the right granted to every exclusive franchisee to prevent the manufacturer from breaching that agreement by opening a second franchise in the territory reserved by the franchise agreement exclusively to it. In addition, there is nothing "unique" or "unusual" about Quality's geographic breadth and duration allegations. As pointed out below (*infra*, Point III), the differences between a franchise covering the "Minneapolis area" and one limited to any stated smaller area, and a franchise of perpetual or indefinite duration and one limited to any shorter stated period of years, are differences of degree, not of kind. The effect of the Court of Appeals' ruling is that, whatever the duration or geographic area covered by the franchise agreement, that agreement is subject to review under the rule of reason when it is alleged that it is unreasonable in the light of current market conditions. That holding cannot be limited to the peculiar facts of the case in which it was announced. It's application to all exclusive franchise agreements is clear.[4]

[3]Quality also claims that the present exclusive is unreasonable because there is no business justification for it. (Quality Br. p. 8). However, the presence or absence of business justification is irrelevant in determining the reasonableness of an exclusive. (Petition p. 16). The antitrust laws were not calculated to convert the federal judiciary into a super business tribunal to review the reasonableness of the multitude of business considerations that go into the decision of a manufacturer to deal with one customer to the exclusion of another.

[4]Ford acknowledges that if the decision does in fact have an impact on all exclusive franchise agreements, it too would urge this Court to review that decision. (Ford Br. p. 7).

II.

RIPENESS FOR REVIEW

Ford's claim that this case is presently only "interlocutory" and not "ripe" for review (Ford. Br. p. 6) is plainly wrong. The Petition seeks review of the grant of a judgment on the pleadings. That decision ended the litigation on the merits and was a "final," not "interlocutory," decision. Rule 54(a), Federal Rules of Civil Procedure; *Catlin v. United States*, 324 U.S. 229, 233 (1945). Under Ford's theory, the question of the sufficiency of Quality's pleadings would never be ripe for review since, after a trial on the merits, the decision on the motion for judgment on the pleadings would be moot. 5 Wright & Miller, *Federal Practice and Procedure* §1372, p. 707. It is only in the procedural context of this case that this Court can ever resolve the right, *vel non*, of an unsuccessful franchise applicant to litigate the reasonableness of the refusal to grant him a franchise when he has pled nothing more than Quality has in the case at bar. Confronted with an ever-increasing backlog of cases, the District Courts need guidance on the question whether such cases may be summarily disposed of or must be docketed for trial on the merits. The instant case is an appropriate vehicle for this Court to provide such guidance.

III.

GEOGRAPHICAL AREA AND DURATION

Quality claims that Petitioners assert that exclusives are legal regardless of the circumstances. (Quality Br. p. 14). This, of course, is not true. Petitioners do claim, however, as this Court ruled in *Schwinn*, that an antitrust claimant

must allege "something more" than a vertical exclusive dealing arrangement to state a claim and that Quality's allegations of overly broad geographical area and unreasonably long duration, uncoupled with an allegation of anticompetitive abuses claimed to have flowed therefrom, is not the "something more" required by *Schwinn*.

Respondents have cited no court decisions, and Petitioners are aware of none, which hold that an otherwise lawful exclusive franchise is rendered unlawful because it has become unreasonable in size or duration.[5] Having found no decisions supporting their position, respondents seek to undermine the avalanche of precedent validating exclusive franchises by arguing that in none of those cases was the franchise as broad in geographical area or as long in duration as the one in the case at bar.[6] Even if that were true, the differences between a franchise covering the

[5]Nothing in *Chicago Board of Trade* deals with the duration of an exclusive, the proposition for which it was cited by Quality (Quality Br. p. 18). *Chicago Tribune*, cited by Quality in connection with its geographical breadth argument (Quality Br. p. 20), did hold that, because of the geographical breadth of the exclusives granted in that case, there was a real danger that significant portions of the public would be denied access *altogether* to the features of the Tribune. (309 F. Supp. at 1308). However, no such allegation is made in the case at bar. Quality's claim is not that a portion of the purchasing public is being denied access to the Lincoln line altogether, but rather that the public is injured by having only one rather than two Lincoln dealers to make their purchases from.

[6]The franchises validated in *Schwing* and *Packard* were as broad in geographical scope as the one in the case at bar. In its attempt to bolster its claim that the exclusive was "perpetual," Quality has appended to its brief two Ford interoffice memoranda. (Quality Br. p. 5 n. 14). This excursion outside the record proves too much. It shows that the limitations in the 1962 letter (Ford Br. p. 3 n. 1) were actually being policed by Ford. It also shows that the 1962 agreement was granted in the first place, not because Ford was an instrumentality of Petitioners, but as an inducement to get Petitioners to accept and invest in a failing franchise. Quality nowhere contends that the initial grant of the exclusive was the result of anything other than arms-length bargaining.

"Minneapolis area" and one limited to a ten-mile radius, and a franchise of perpetual or indefinite duration and one limited to a period of years, are differences of degree, not of kind. If it is true, as respondents contend, that it is a question of fact whether the "Minneapolis area" is overly broad, why isn't it also a question of fact whether the 10-mile radius specified in the standard Ford franchise agreement (Ford Br. p. 5; Quality Br. p. 17) or any other stated geographical limitation in any franchise agreement is also overly broad in the light of current market conditions? If it is true, as respondents contend, that the grant of a franchise of indefinite or perpetual duration raises a question of fact concerning the reasonableness of the duration of the franchise, why isn't it also a question of fact whether the two-year term Quality conceded to be reasonable (Quality Br. p. 18) or any other arbitrary time limitation in any franchise agreement is reasonable in the light of current market conditions?[7] Such a result is mandated by the Court of Appeals' decision. If that is the law, every unsuccessful applicant for a franchise can allege an antitrust violation and secure a trial on the merits. Petitioners

[7]A so-called "perpetual" franchise will, at any given point in time, have been in effect for a time certain. When it has been in effect for two years, for example, it is difficult to perceive how its impact on competition differs from a two-year franchise, particularly when the two-year franchise, as is usually the case, is renewable indefinitely. That the so-called "standard" two-year automobile franchise which Quality holds up as a model of reasonableness (Quality Br. p. 18) is also a franchise of indefinite duration is evident from the fact that Quality's Mercury exclusive has remained in effect since 1968 (Quality Br. p. 3), only six years less in duration than Petitioners' Lincoln exclusive. Under Quality's theory, a person denied a Mercury franchise today within ten miles of Quality's facility would be entitled to a trial on the merits on the question of the reasonableness of the 10-mile radius limitation and the duration of the franchise, which has been in effect since 1968. Quality would then no doubt agree with Petitioners that something more is required to state an antitrust violation.

submit it is not the law. While it may be true that the potential for abuse may be greater where the duration of the franchise is longer and the geographical area covered is broader, it is the abuse which is prohibited, and not merely the potential for abuse. Unless and until that abuse becomes manifest, by price fixing or monopolization, for example, the "something more" required by *Schwinn* does not exist and the agreement is lawful. Quality has pled neither price fixing nor monopolization nor any other abuse claimed to have resulted from the franchise granted to Petitioners. For this reason, the Court of Appeals was required to sustain the trial court's grant of judgment on the pleadings.

IV.

PETITIONERS' "VETO" RIGHT

Quality claims that Petitioners, in their sole discretion, determine if the Minneapolis market will have a second Lincoln franchise (Quality Br. p. 9) and, using this premise as a springboard, argues that the exercise of this right is, in effect, a "veto" over the entry of a horizontal competitor of the sort condemned in *Topco* and *American Motor Inns*. (Quality Br. pp. 10-14). The Court of Appeals bought this argument hook, line and sinker. (Petition, Appendix C, p. A-21). As noted in the Petition, however, every exclusive franchise gives the franchisee the right to exclude horizontal competitors. (Petition p. 17). If it didn't, the "exclusive" feature of the agreement would be purely illusory. If the Court of Appeals' decision is permitted to stand, every franchisee who merely seeks to enforce the "exclusivity" of his agreement can be accused of exercising such a "veto" and, therefore, of violating the antitrust laws.

The multitude of cases cited in the Petition demonstrate that this is not the law, at least outside of the Eighth Circuit.

CONCLUSION

Petitioners submit that, for the reasons stated in their Petition, a writ of certiorari should be granted to resolve the important questions of Federal law involved in this case and the conflict that exists between the decision of the Court of Appeals in the case at bar and prior decisions by this Court and other Courts of Appeals.

Respectfully submitted,

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